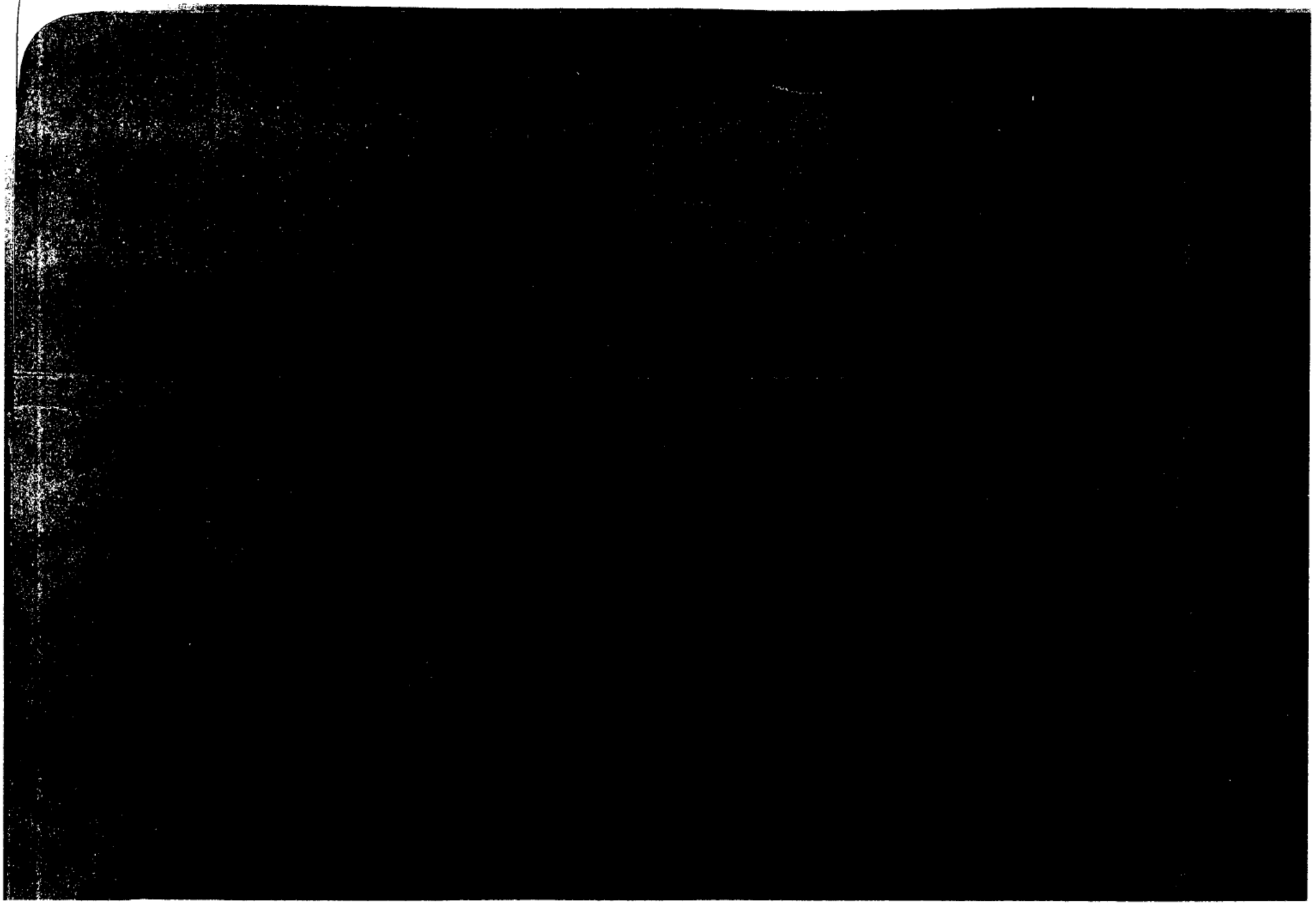

FEDERAL

Author: Brad Leonard at NPR
Date: 6/1/97 2:13 PM
Priority: Normal
TO: Annetta Cheek at NPR
Subject: Re: Federal Advisory Committee Act
---------- Message Contents ----------

Annetta:

FACA is indeed a problem. A decade ago I needed to get immediate community input to learn of their concerns relating to the Yellowstone fires of 1988. We didn't have the time required by FACA to advertise for meetings and all. So I sat down with the Solicitor's Office to figure out what we could do (Gov't lawyers were always very helpful to me when I went to them before a problem was created).

I learned that I could go to meetings called by other people and talk if called upon, that I could solicit the opinions of individuals, that I could be available in a public place and talk with people who came by, etc. With a little common sense, some networking, some reaching out to all viewpoints, to making it known that we welcomed letters, etc., we got enough community input in a relatively short time (30 days) to get the job done. And I kept the Solicitor's Office informed of what we were doing all along the way so they could raise a red flag if needed. And the GAO was doing an investigation almost concurrently (with a lot more staff than we had), and I opened all our files to them.

So in my view, GSA should write something that points out all the ways you can legitimately get public input and raise red flags only where something is directly contrary to law.

I've mentioned to John Kamensky the problems with "good government" initiatives like FACA that end up with counterproductive unintended consequences and end up alienating the people from government. They stem from an era when people thought that more laws and more regulations could solve any problem and perfect the nature of (what NPS calls) "technological humankind."

Brad Leonard

---------- Reply Separator ----------
Subject: Federal Advisory Committee Act
Author: Annetta Cheek at NPR
Date: 5/29/97 3:40 PM

For those of you who asked for more details on this act -

The principle behind this act was to ensure that agencies who ask for outside advice on their programs get balanced input. The act requires that if you are getting consensus advice on an issue get a charter for the group under the act. The charter has to specify who is being askd to attend. The charter has to be approved by GSA, reviewed by OMB, and filed with Congress before the gorup can meet. This applies even if there is to be only one meeting (if you are asking the group to give you consensus, rather than individual, advice). Agencies have found the act to have a chilling effect on their efforts to get input on their programs from outside parties.

United States Department of Agriculture
Forest Service
Eastern Region
310 W. Wisconsin Ave.
Milwaukee, WI 53203

File Code: 1620

Date: June 30, 1997

Mr. Vincent Vukelich
Committee Management Secretariat
GSA, Office of Governmentwide Policy
Room 5228 - MC, 1800 F Street., NW
Washington, DC 20405

Dear Mr. Vukelich:

We appreciate the opportunity to comment on the Advance Notice of Proposed Rulemaking for the Federal Advisory Committee Act (FACA). The Eastern Region of the USDA Forest Service is committed to effective public involvement.

I have been the Region's public involvement specialist for the past year. My observation is that employees and the public have varying levels of concern over whether FACA inhibits collaboration between the agency and the public. I would like to highlight three concerns:

Consensus - I have heard citizens express concerns that they will invest a lot of time working with others, they will come to agreement, and then the federal decision maker will be unable to use their recommendation because it represents "consensus." The decision maker is put in a very awkward situation. Perceptions that FACA might be violated creates a chilling effect on people's willingness and ability to reach agreement.

Working Together - Better decisions are made with public involvement. Reaching a decision involves work, and often there are opportunities for members of the public to work with task teams to gather information and learn from it. Concerns about violating FACA can inhibit this activity. Working with subject-matter experts may create the impression that the involvement process isn't "open." Employees wonder about attendance at government meetings by citizens, even when they just observe.

Some situational guidance and good examples might help people who are concerned about keeping the process open. I don't hear concerns over formal FACA advisory committees. The number of these committees is limited, and I don't get requests to form new ones.

Thank you for the opportunity to comment on the Federal Advisory Committe Act. We appreciate your initiative in clarifying its intent and application.

Sincerely,

(b) (6)

LINDALOU STOCKINGER
Public Involvement Specialist

7/8/97

Author: "douglas mutter" <douglas_mutter@ios.doi.gov> at internet
Date: 7/1/97 2:46 PM
Priority: Normal
TO: vincent vukelich at GSA-MC
Subject: Comment on FACA Rules

9

This is in response to your request for comments regarding proposed rulemaking for FACA.

I serve as the Designated Federal Officer for the Exxon Valdez Oil Spill Public Advisory Group (PAG). The PAG was created by a court order as the result of the oil spill settlement. The order runs for 10 years. It is cumbersome to have to re-establish the PAG every 2 years and renew the charter, etc. It would be helpful in these types of cases to not have to renew every 2 years when a specified time period already is set by such an agreement. Other pollution cases may have the same issue if they establish advisory groups (e.g., Restoration Advisory Boards for cleanup of federal facilities).

Also, PAG members are chosen because of their knowledge and interest in the oil spill. In many cases they are financially affected by the spill and may have claims of their own filed against the polluter. Conflict of interest is anticipated and documented in their application for membership. It is unclear how this should be handled via FACA. It seems that flexibility is required for pollution situations where the public most interested is the public most affected.

Please add me to your FACA mailing list:

Douglas Mutter
Office of Environmental Policy and Compliance
U.S. Department of the Interior
1689 C Street, Room 119
Anchorage, Alaska 99501

Department of Energy
Southeastern Power Administration
Elberton, Georgia 30635-2496

July 2, 1997

Mr. James L. Dean, Director
Committee Management Secretariat
U.S. General Services Administration
Office of Governmentwide Policy
18th and F Streets, NW
Washington, DC 20405

Dear Mr. Dean:

Southeastern Power Administration has no comments on the *Federal Register* Advance Notice of Proposed Rulemaking regarding the Federal Advisory Committee Act which you requested in your June 24, 1997, letter.

If you need any additional information, please let me know.

Sincerely,

(b) (6)

Joel W. Seymour
Assistant Administrator
Human Resources and Administration

Author: "donald l. weaver" <dweaver@hrsa.dhhs.gov> at internet
Date: 7/2/97 12:04 PM
Priority: Normal
Receipt Requested
TO: vincent vukelich at GSA-MC
Subject: Fed Advisory Committee Act Regulations: Comment

The Federal Register notice of June 10 on Federal Advisory Committee Management, Notice of Proposed Rulemaking, invited comments on above.

Our comments are as follows:

Closing Advisory Committee Meetings Under the Government in the Sunshine Act

We concur with the thrust of opening national advisory committees to the public. After all, they are advising various Federal organizations on public policy. However, the current policy in some ways actually inhibits committee deliberations. We would recommend changes in two areas: (1) make some provision for executive sessions; and (2) restrict access to committee working papers.

Every committee needs to work in executive session, if only to resolve internal issues, that is issues which are germane to the functioning of the committee itself, but have little to do with the Committee's advisory role on public policy. Most committees find ways to do so.

Granting public access to committee working papers is a mistake. Working papers are usually drafted by committee members and their staffs to generate debate, to raise questions or issues which then lead to further research or consideration by the committee. They are neither completed products, nor policy recommendations. In fact the policy recommendations which ultimately emanate from an advisory committee may be at odds with some of the working papers which were generated in the process.

We understand the importance of public access to the government's work, but these changes would actually improve the process.

Thank you for the opportunity to comment.

Donald L. Weaver, M.D.
Executive Secretary
National Advisory Council on the National Health Service Corps
(301) 594-4130

Author: "luetta flournoy" <flournoy.luetta@epamail.epa.gov> at internet
Date: 7/2/97 9:51 AM
Priority: Normal
TO: vincent vukelich at GSA-MC
Subject: FACA Mailing List

I just received a 6/24/97 memo regarding the Federal Advisory Committee Act (FACA). The memo indicated that a mailing list is being put together for an informational package regarding FACA. I would appreciate being put on this mailing list. My address is:

Luetta Flournoy, Chief
Pesticides Branch
EPA Region 7
726 Minnesota Avenue
Kansas City, Ks 66101

The 6/10/97 Federal Register Notice attached to the memo states that: "Many of the difficult questions arise when a Federal agency seeks to involve the public in the decisionmaking process pursuent to laws which require or encourage public involvement but does not intend to establish a committee covered by the Act. In many cases, there is no clear answer to when a public involvement strategy or situation may "trigger" the formal requirements regarding advisory committees under the Act." We do work with States and Tribes to authorize or certify State/Tribal Pesticide Programs. Public participation is a part of this process. Please let me know If you have any insight or thoughts as to whether FACA may apply to this type of process. Thanks!

FAXED TO YOU 7/9/97

DEPARTMENT OF HEALTH & HUMAN SERVICES

Public Health Service

Substance Abuse and Mental
Health Services Administration
Rockville MD 20857

DATE: July 7, 1997

TO: Committee Management Secretariat
General Services Administration

THROUGH: Acting Associate Administrator (b) (6)
Office of Policy and Program Coordination

FROM: Acting Director, Extramural Programs

SUBJECT: FACA Regulation Revision: Advance Notice of Proposed Rulemaking

Thank you for the opportunity to comment on the Proposed Rulemaking, published in the Federal Register on June 10, 1997.

We requested comments from SAMHSA's Center Directors and Administrator (as Council Chairs), our Executive Officer, and Director, Office of Extramural Activities Review. Comments were also requested from our Deputy Administrator, Legislative Officer, Center policy staffs, Acting Associate Administrator for Office of Women's Services, Director, Division of Workplace Programs, Office of General Counsel, and Council/Committee Executive Secretaries and Committee Management staffs.

SAMHSA's comments have been compiled into the attached document. If you have any questions, please contact Jeri Lipov, Committee Management Officer, at (301)-443-4266.

(b) (6)

Joel W. Goldstein, Ph.D.

Attachment

cc: HHS Committee Management Officer

RECEIVED 7/10/97

COMMENTS FROM SAMHSA ON
GSA PROPOSED REVISION TO REGS IMPLEMENTING FACA -
ISSUES LIKELY TO BE ADDRESSED (Per June 10, 1997 FR Notice):

A. SCOPE AND APPLICABILITY

1. Review Applicability of Act to Pre-Existing Groups.

SAMHSA is not sure of the meaning of this. We interpret it to mean groups other than Federal advisory committees. In other words, if a group of citizens formed an advocacy organization representing States receiving SAMHSA block grant funds and they requested a meeting with SAMHSA, this should not be subject to FACA. However, if SAMHSA requested the meeting, we'd have to review the purpose of the meeting and the FACA questions to see if FACA applied.

If it means pre-existing Federal advisory groups that should be covered by FACA, then the regs need to prescribe how to proceed to bring it in line with FACA. (This could potentially open a door, so that folks could 'expedite' the process of establishing a committee and then clean up after themselves by doing the paperwork).

2. Revise Definition of "Utilize" Which Currently Appears in the Regulations at 41 CFR 101-6.1003.

"Utilized (or used), as referenced in the definition of advisory committee in this section, means a committee or other group composed in whole or in part of other than full-time officers or employees of the Federal Government with an established existence outside the agency seeking its advice which the President or agency official(s) adopts, such as through institutional arrangements, as a preferred source from which to obtain advice or recommendations on a specific issue or policy within the scope of his or her responsibilities in the same manner as that individual would obtain advice or recommendations from an established advisory committee."

SAMHSA has not had experience with this type of situation yet, but agrees that it needs clarification due to the potential for this happening and the numerous case law issues related to this definition.

3. Provide Additional Guidance on Committees Which Perform Primarily Operational as Opposed to Advisory Functions as Currently Defined at 41 CFR 101-6.1004(g).

"Any committee which is established to perform primarily operational as opposed to advisory functions. Operational functions are those specifically provided by law, such as making or implementing Government decisions or policy. An operational committee may be covered by the Act if it becomes primarily advisory in nature."

SAMHSA agrees that this definition needs clarification. For example, SAMHSA has two chartered initial review groups known as Special Emphasis Panels (SEPs). Some individuals believe that these groups perform the operational task of "prioritizing grant and contract applications/proposals on the basis of technical characteristics" measured by outside experts. In other words, they rank proposals so Federal staff are better able to apply the award criteria, enter negotiations and make funding decisions. This activity is mandated by SAMHSA's enabling legislation (Section 504 of the PHS Act; 42 USC 290aa-3).

The management of SEPs under FACA is time- and money-intensive. Each SEP panel is created for a particular review (based on technical expertise required for a given application or proposal); there are no standing members. All SEP meetings are closed to the public, in accordance with the Government in the Sunshine Act, so there is no clear benefit to the public to publicize these meetings in the Federal Register. It is almost procedurally impossible to comply with the FACA requirement to publish at least 15 days prior to the meetings, due to the nature of the grant and contract review cycles, especially when it comes to reviews for disaster assistance grants under FEMA. In addition, exhaustive records have to be maintained for such groups in order to be able to comply with the advisory committee reporting requirements.

Removing these committees from FACA coverage would reduce the number of Federal advisory committees, thereby providing room in the committee ceilings for those committees that were needed. To propose this action would not appear to be contrary to the original legislative intent in the creation of FACA (to prevent "domination of committees by representatives of industry, who are thereby afforded a special opportunity to influence federal policy on matters in which they have vested economic interest but which are also of vital concern to the public.")[1] Furthermore, in some of the case law, it would appear that some decisions would be the basis for such an action. In Sofamor Danek, related to a panel 'utilized' by the Agency for Health Care Policy & Research (AHCPR), the district court concluded, among other things, that its dismissal of the case was justified also by prior case law in which the FACA was held not to apply to advice "regarding a discrete and narrow scientific question rather than a public policy issue." SEPs offer a discrete and narrow scientific/technical review of specific grant and contract applications and proposals.

In addition, a key part of the argument in Nader v. Baroody is that there was "little or no continuity in the membership." This is absolutely true for the SEPs - each panel is created uniquely for the technical expertise required for each grant or contract requirements. Furthermore, individuals on the SEPs score each application/proposal independently, from which a total score is derived, using a formula. Therefore, it can be argued that these committees are 'operational' in nature - and thus beyond FACA's scope.

---

[1]Public Citizen Litigation Group, October 1989.

Removing SEPs from FACA coverage also makes sense from a reinvention perspective. It would eliminate extensive record-keeping and use of limited fiscal resources, for activities which offer little or no benefit to the public.

At the very least, if not determined to be operational, perhaps a separate category of committees can be established, under FACA, for initial review groups. SAMHSA firmly believes in the principles expressed within FACA, but under the current system, we see no benefit to the public from trying to follow the same procedures as our other committees.

4. Explain Exclusions from the Act's Coverage, Including New Provisions Based on Section 204(b) of the Unfunded Mandated Act, Public Law 104-4, Relating to State, Local and Tribal Government Representatives.

It is vital to SAMHSA to work with State, local, and tribal governments. As we move ahead with the Government Performance and Results Act (GPRA) and other recent initiatives working with States as partners, we need the regs to clarify (as broadly as possible) what types of communications are exempt from FACA. Government agencies that work with State, local and tribal governments need mechanisms to encourage dialogue rather than erect barriers to it. We endorse the components of the Unfunded Mandates Act, which allow for some streamlining of FACA requirements - such as a charter not counting against the committee ceiling. However, as we understand it, much of FACA still applies. There is still much to be done to allow for streamlining, recognizing these are usually temporary activities related to a specific question or task:

- is a charter even necessary or could a Memorandum of Understanding be drafted and a copy provided GSA?
- can the agency head appoint members without a lengthy process?
- can appointed 'members' be offices or organizations so that individual delegatees would participate at a given meeting?
- how does 'balance' apply to a committee of such individuals (since they have similar backgrounds)?
- does it serve the public to keep the same kinds of records as with FACA committees and prepare the same level of reports?

One of the questions agencies face is when is FACA triggered? For example, we might meet with only State and local government representatives on a particular issue and not invoke FACA; however, if we add 1 or 2 representatives from an organization of similar people (e.g., National Association of State Alcohol and Drug Abuse Directors) who are not also State representatives, then FACA applies?

One could make the case that such committees are 'operational' (using arguments similar to those used for exempting peer review groups from FACA) and therefore exempt from FACA?

B. STATUS OF INDIVIDUALS

1. Provide Definition of "Full Time Federal Employee" under the Act.

When FACA was written, there was little or no opportunity to have other than full time employment. Now, there are various workplace initiatives and opportunities for flexibility of an individual's work schedule. Currently, the way this is written in FACA, a part-time permanent employee cannot serve as the DFO. We recommend that the language read: "permanent Federal employee." However, we recognize that the regs cannot change the law but merely interpret it, so this may not be possible.

2. Clarify Status of Consultants to Advisory Committees.

Consultants should be clarified as they relate to committees. Consultants are primarily used for their particular expertise to bring knowledge to the committee to assist them in their deliberations. A consultant is an individual officially invited by the agency to participate in an official capacity - to speak to the Council or otherwise provide technical expertise on a matter. Other 'experts' may attend public meetings, but they have no formal role other than members of the public, because they attend of their own volition. They may speak during the public comment period, and a committee member may even ask them to answer a particular question, but these individuals are not paid an honorarium or reimbursed for travel, as official consultants are.

Consultants (whether appointed as SGEs or brought in under Professional Services Contracts) are not 'appointed' members and therefore cannot act as a member (e.g., sit at the table, participate in deliberations, or vote) except in some cases where they have been appointed by the agency as a temporary voting member for a given issue at a particular meeting.

C. CONSENSUS

1. Update and Expand References to "Consensus' Advice as a Factor in Determining the Act's Coverage to Specific Groups of Meetings.

Clarify how an agency can protect itself from FACA trouble when using advice from individuals (e.g., where the courts have found an agency utilized it as consensus advice). Clarify the difference between a group of individuals, acting as individuals, reaching consensus vs. when the agency solicits a consensus opinion. Distinguish also the difference between consensus and unanimous opinion.

D. ESTABLISHMENT AND OPERATION OF FEDERAL ADVISORY COMMITTEES

1. Revise Procedures for Establishment, Re-establishment, or Renewal of Advisory Committees.

Procedures for establishing committees should be streamlined (maybe on an-line fill in the blank charter?), especially as it relates to committees formed to meet an immediate problem (e.g., committees formed under Reg-Neg and Unfunded Mandates).

Why is it necessary to renew/recharter (full set of documents) every two years? Why can't a simple memorandum be developed from the agency head to GSA, saying the accomplishments of the committee have been reviewed (based on the GSA Report), and it is the agency's decision to retain the committee for another two years? This is particularly true for statutorily mandated committees.

2. Review Elements of "Balance" for Committee Membership.

Clarify 'balance.' FACA says, "require the membership of the advisory committee to be fairly balanced in terms of the points of view represented and the functions to be performed by the advisory committee" (PL 92-463 Section 5(b)(2)). Additionally, the PHS Act mandates SAMHSA's Councils to have 12 members - 9 professional members and 3 public members (from a variety of professions). This is an attempt to ensure some measure of balance.

In addition, the Department of Health and Human Services and SAMHSA have both tried to comply with the balance requirements by ensuring representation of both genders, breadth of racial/ethnic minority groups, geographic location, type of employment (e.g., states, universities, community organizations), etc.

However, it must be recognized that balance on a given committee depends somewhat on the issue before the committee. Some leeway must be left to the agency to determine if the committee is balanced; the regs should merely describe how agencies should go about balancing a committee's membership. For example, many committees would benefit from having a consumer serve as a regular member; others might want an individual consumer appointed as a temporary voting member for a particular meeting/issue only; it might be inappropriate for other committees to include a consumer as a member.

3. Expand discussion for closing an advisory committee meeting under the Government in the Sunshine Act and other relevant statutes.

SAMHSA believes it does not contribute to the public interest to publish Federal Register notices for each and every grant and contract review committee meeting. These meetings

are entirely closed to the public, and in the case of contract proposals, even the title of the RFP being reviewed is not made public (to protect the integrity of the procurement process). We propose that such meeting notices be able to be published annually as a blanket notice each year in January. Specific meeting dates and times can be readily determined by interested citizens and groups by contacting the individual listed as Contact in the Federal Register notice.

Furthermore, there are financial costs involved in publishing these notices. In our opinion, these costs are not offset by the theoretical benefit to the public of publishing each and every notice of peer review meetings individually. If necessary, a retrospective list of the previous year's meetings of peer review committee meetings could be published in order to provide public notification of an agency's activity.

July 8, 1997

Comment on Advance Notice of Proposed Rulemaking; 41 CFR Part 101-6; Federal Advisory Committee Management

I've been a member of a reinvention lab for almost two years. Our mission has been to reinvent library services for seven federal, state and university based natural resources information centers and libraries in Anchorage, Alaska. The FACA process has constantly been a thorn in our side.

When we first started meeting, we were informed by our solicitor that since half the team members came from outside the federal government, we were illegal and could no longer meet, unless we went through the FACA process. Needless to say the process would have set us back by quite a few months, and we didn't have that kind of time to spare. We went to our reinvention lab advisors asking for help, but were told there was nothing that could be done, so we simply continued to meet.

We are finally reaching the implementation stage with the new federal/state/university library opening its doors later this fall. Our management structure has three tiers, at the top is Management Representation from all participating entities. This body will approve policy, budget and generally behave as all management does. The second level is the Library Team who will be responsible for daily operations, programs, etc., and last but not least is a User's group which we called the User's Advisory Group. This group will provide a voice from all library users and the community on how we're doing, what could be changed, etc. But we can't have this group unless we go through the FACA process. Back to square one — as long as we change the name of the group to something other than "Advisory" we can go ahead.

This is silly. I seriously doubt the law was established to govern when or how librarians could meet with other librarians to find more efficient ways to meet user information needs, or to meet with a "Friends of the Library" group to improve service.

(b) (6)

Christine R. Huffaker
Librarian

7/8/97

FACA: Proposed Rule-making

The following general observations are developed from my experience as the interagency liaison with the Applegate Partnership since 1992. Personnel from the Bureau of Land Management and the Forest Service were on the board of directors of the Applegate Partnership in the first year. But the sensitivity surrounding FACA in 1994 prompted recommendations from the Justice Department (and subsequently Office of General Council) to suggest agency partners resign from the board. The group had felt there was no problem with FACA since it was a grass-roots coalition that invited agency representatives (rather than it being created by the agencies.) The group's focus was on the entire Applegate River Watershed which included private as well as federal lands. And all existing laws (and decision processes) were respected. The intent was to work together to achieve healthier ecosystems (including communities).

Following the agency withdrawal, there was an enormous backlash. To say that there were hard feelings is putting it mildly. Repercussions were felt not only within our community, but among many community-based groups. The advice given to the agency participants was to **not** meet regularly with the Applegate Partnership. But nowhere in FACA could I find language discouraging or prohibiting discussion of information (and common goals) between federal and non-federal people. So we continued to meet and pursue legal routes to continue regular frequent interaction despite flagrant threats related to FACA.

We have seen FACA used and misused. We no longer wear the caps hailing "FACA U." We made it to the other side of that treacherous mountain. But we surely hope changes can be made to the guidelines which clarify ways and encourage citizens working together, rather than creating disincentives. It seems that FACA has been wrought with "how not to do it" direction rather than "how can we do it." With humility (presuming no legal expertise), I offer these comments for consideration:

- It seems that most problems with FACA are perceptual rather than actual. There is a great deal of misunderstanding and fear regarding the act.

- Most of the interaction that agencies have at the community level is ***information exchange***, which is not regulated by FACA. The opportunity to share information freely with non-agency people is essential and needs to be encouraged. But FACA is perceived as a barrier (and sometimes used as a roadblock) for groups and individuals to meet with agency personnel. Meetings for the purpose of information exchange can be frequent or "regular". But some internal agency direction has cautioned against "regularly scheduled" meetings with groups. Such direction is misleading and sets up paranoia among personnel. It seems that any future clarification of FACA could describe the issue of information exchange noting that such communication is not problematic. Perhaps specific examples could be cited of how agency people are participating in groups.

- The type of public involvement in which the agencies (BLM & FS) are engaged in the Applegate area has greatly increased in the last several years. Public notices or a few public meetings are no longer the norm. One Resource Area manager said recently, "We'll meet with anyone, anytime, anywhere, about most anything." Numerous field trips and meetings with neighbors in private homes are common when planning landscape projects nearby.

- What is important regarding FACA about these local public involvement efforts, is that there is clarity about the process and with whom the decision authority rests. Basically people know up front that a collaborative process is operative in phase 1. Then phase 2 is not collaborative; that is the time that the final decision is made by the line officer based on all the information. From the scoping through findings to alternative development, there is a lot of "collaboration" going on. (A definition offered here of collaboration is: people working together.) Mutual education is a key part of that and goes both ways. The opportunity to meet is available to all interested people. The Environmental Analysis is likewise freely available.

- Hopefully your team has the "decision-making pyramid" developed by Owen Schmidt, OGC, Portland illustrating how "evidence" is fundamental to decision-making. In that evidence-gathering phase, there is no problem with FACA. The top of the pyramid shows the ultimate conclusions and decision (legal effect) which is the sensitive ground. I think it's in the "middle ground" where basic conclusions (and alternatives developed) that I tend to disagree with Owen as to whether or not FACA is employed. Nevertheless, the pyramid offers a useful visual tool that may assist others.

- The issue of "utilization" of groups by agencies was discussed in a recent article by Betsy Rieke[1] in which she concludes that community-based groups generally are not subject to FACA. It seems that the utilization issue of existing or agency-initiated groups is confusing. It is appropriate and beneficial for agencies to interact with such community-based groups as watershed councils. Most of these collaborative-style groups are established at the grass-roots level, without agency direction. Assuming the "establishment" aspect is not on the table, the question pertinent to FACA is then: is the group is utilized by the agency? Rieke notes a critical factor (that could be clarified further) is whether or not the group is used as a ***preferred source*** of advice? If the agency seeks interaction with a number of groups or individuals about a particular issue or project, then it would seem the interaction with a particular group is not problematic.

- In working with the Applegate Partnership, I have tried to frame the solicitation of ideas (which could be construed as advice or recommendations) within a context that ***individual*** ideas are being sought (and recorded). At no time is the group asked for a consensual

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[1]Rieke, Betsy, Draft 4/1/97 Federal Advisory Committee Act, Natural Resources Law Center, University of Colorado School of Law, 303-492-1293.

recommendation (or even general agreement regarding an approach). I believe that distinctions can be made between utilizing a group and seeking individual opinions. (Again the record would show that similar solicitations were made to other individuals.)

- Permit me to follow this logic trail regarding individuals versus groups one step further. It seems that a set of individuals could be "chartered" (established) by an agency with specific tasks that include giving expert or technical advice, as long as the there is clarity that the group ***as a whole*** is not being solicited for such advice. And, of course, facilitation and minutes of such meetings need to reflect this commitment. The charter needs to be clear that what is being requested is not a set of consensual recommendations -- instead the desired outcome is a compilation of individual perspectives (which could, of course, differ greatly. A critical measure for the use of individual ideas, is again the "preferred source" measure. Is there evidence of other input from individuals or groups? (The Applegate Adaptive Management Area [BLM & FS] has chartered a research and monitoring technical team made up of private and agency scientists to attend field trips, review monitoring plans, and give technical expertise as *individuals*.)

- Another method we've used to move ahead with the Applegate Partnership related to FACA involves the situation of when the group wants to make a consensual recommendation (e.g., via a letter to the agencies). This is also a confusing area, because the act regulates "obtaining" of advice by federal agencies, not the "giving" of advice to them. We have tried to insure that there is not a violation of FACA by organizing the agenda so that the information exchange portion (which accounts for more than 99% of all the time) is on first. There may be discussion about the project or issue as long as it remains in the information exchange forum (e.g., if x occurred, what would be the effect?). Then, at the last agenda item when the group wants to fully discuss the proposal and make a recommendation, the agency personnel physically leave the meeting. In that way there is no conflict of interest or appearance of using the group for advice.

- In addition to the examples already discussed of how FACA was a hindrance, many others could be cited. As mentioned earlier, the main hindrance is perceptual. On the average, I receive at least one phone call per week from various agency people (in different agencies) that are needing some encouragement or framework to respond to community groups. In many cases, they were discouraged by staff or their bosses to engage in group associations. Examples of these include: a county tourism coalition wanting Forest Service participation on the board and at monthly meetings, a timber purchasers group seeking the BLM presence in quarterly breakfast meetings discussing reciprocal road use agreements, a coalition of trail users meeting monthly to discuss trail conditions and opportunities wanting FS and National Park people present, etc.

- As a useful tool, FACA has been used by the agencies in the Northwest to develop interagency advisory committees and province advisory committees. This structure has facilitated highly diverse interest groups to meet with local and federal agencies to discuss

common issues. Though highly formal at this time, these kind of advisory groups may provide a useful framework for ecosystem management issues around the country.

Thanks for the opportunity to comment. I'll be keenly interested in your progress!

Su Rolle
Interagency Liaison FS/BLM
Medford, OR

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION VIII
999 18th STREET - SUITE 500
DENVER, COLORADO 80202-2466

Committee Management Secretariat
General Services Administration
Office of Government-Wide Policy
Room 5228-MC
1800 F St., NW
Washington, DC 80405

Attention: FACA Regulations

Restrictive FACA regulations have obstructed effective public involvement in EPA Region 8. FACA appears to deny EPA one of its most useful public involvement tools--the local advisory committee. The regulations hamper EPA's ability to carry out legislative and administrative mandates to increase the role that local communities play in environmental decision-making. We have encountered difficulties with FACA in many community-based environmental protection efforts and Superfund sites in the Region. If specific examples would be useful, we would be happy to provide you with a listing.

The most effective way to resolve many local environmental issues is to work with community members to reach a consensus on how to protect the environment and at the same time meet the community's needs. Often, the most efficient way to go about reaching consensus is by establishing a working group--a local advisory committee, in fact--that is representative of the stakeholder interests in that community. In this setting, problems are identified, options for correcting the problems are evaluated and, hopefully, agreements are reached on a course to pursue. Ideally, state and federal agencies are participants in developing consensus solutions rather than waiting passively for "advice" or recommendations developed by other stakeholders.

At present EPA nationally is allowed only a limited number of FACA committees--far fewer than are needed to meet local community involvement needs. In addition, it appears that unless an advisory committee is chartered by FACA, members can't provide consensus advice to the agency. This restriction forces us to act out a charade whereby we claim that local committee members are providing "individual advice" instead of reaching consensus despite the fact that the real value of these committees' recommendations is precisely that they do represent a broad based consensus view. Citizens have no patience with this sort of sophism. What's more, prescriptive FACA regulations (meeting notices published in Federal Register, etc.) make administering a community advisory committee unnecessarily cumbersome. No one in Buena Vista, Colorado, reads the Federal Register!

With this as background, we would like to make the following suggestions for revising the FACA regulations:

- Remove FACA's obstacles to community-based groups working together to solve local environmental problems by clearly exempting local community advisory committees and other local stakeholder groups from FACA regulations. These local groups still can meet the spirit of FACA regarding timely meeting notification, openness to the public, etc., without being stifled by the restrictions in the current regulations.

- Limit FACA regulations to national advisory committees only.

- A paragraph in the Federal Register Advance Notice of Proposed Rule Making (6/10/97) says, "Many difficult questions .....when a Federal agency seeks to involve the public in the decisionmaking process pursuant to laws which require or encourage public involvement but does not intend to establish a committee covered by the Act. In many cases, there is no clear answer to when a public involvement strategy may "trigger" the formal requirements regarding advisory committees under the Act." This statement makes us nervous. We hope that the intent in revising the FACA regulations is not to extend them to additional public involvement activities beyond advisory committees. Public involvement strategies need to be flexible so that they can meet the unique needs of each situation and community. Well-intended but prescriptive regulations are not conducive to effective local community involvement. FACA should focus very narrowly on advisory committees that are national in scope.

- Regarding "balance." In a community-based situation, a balanced advisory committee includes representatives of all stakeholders for the specific issue/action. Who those stakeholder are varies depending on the community and the environmental problem to be addressed. Again, a one-size-fits-all prescriptive list of interests that must be included in a advisory group is not likely to be applicable to every community-based
group.

- A non-regulatory guidance that suggests approaches to managing advisory committees might be a better approach than the present restrictive regulatory approach. Regardless, it is important to remember that there are significant differences in structure, organization and administration between community-based and national advisory groups.

If you have questions about our comments or would like additional information, please feel free to contact me at (303) 312-6600.

We would like the following Region 8 staff to be included in your mailing list for materials regarding FACA Regulation revisions:

Sonya S. Pennock, Manager
Public Affairs & Involvement
USEPA/Region 8
999 18th Street, Suite 500 (8OC)
Denver, CO 80202-2466

Ayn Schmit
Community Environmental Program Coord.
Ecosystem Protection Program
USEPA/Region 8
999 18th Street, Suite 500 (8EP-EP)
Denver, CO 80202-2466

Sincerely,
(b) (6)

Sonya S. Pennock, Manager
Public Affairs & Involvement

Author: "jennifer l harris" <jlouharris@juno.com> at internet
Date: 7/9/97 7:26 PM
Priority: Normal
TO: vincent vukelich at GSA-MC
Subject: FACA Advance Notice of Proposed Rulemaking

Sir, Thank you for sending the advance notice of proposed rulemaking. As a federal government public affairs officer I have been struggling to conduct public involvement in small, rural towns while meeting the spirit and letter of FACA.

It would be very useful if the exclusions from the Act's coverage under new provisions relative to State representatives were clarified. For example, the State of Oregon is responsible for management of wildlife populations and we are responsible for management of wildlife habitat. Can we work with local state agency employees, in this case fish and wildife, on projects? It is difficult to avoid an advisory relationship with those employees. How about when they are functioning as advisory to the treaty tribal governments? Do we have to meet with them WITH the tribal government representatives present? How about tribal staff?

In remote rural areas we frequently interact with the same interested citizens over a period of time as we develop projects. While we are not seeking consensus advice from them, we are seeking to develop broad public support for our actions. Must we do this one on one? What about the benefits of local people interacting together and with us and collaborating to create an improved project? How do these things differ from "advisory groups?" When does the same group of people become a group or committee? (We are talking about an area with a population of about 20,000 people in a 60 mile radius... there are only so many folks who are interested in being actively involved!)

Obviously, clarification in the regulations would be helpful and non-regulatory guidance would also be helpful.

I look forward to seeing the proposed revised regulations.

Thank you for your consideration of these comments. They are my personal comments and have not been reviewed nor endorsed by my supervisor or agency.

Jennifer Harris
(b) (6)
Prairie OR

United States Department of the Interior

FISH AND WILDLIFE SERVICE
1875 Century Boulevard
Atlanta, Georgia 30345

IN REPLY REFER TO:

July 10, 1997

Mr. Vincent Vukelich
Committee Management Secretariat
General Services Administration
Office of Governmentwide Policy
Room 5228-MC
1800 F Street, NW.
Washington, DC 20405

Dear Mr. Vukelich:

This is in response to the General Services Administration's request for comments regarding a proposed revision of the implementing regulations for the Federal Advisory Committee Act (FACA), published in the *Federal Register* on June 10, 1997 (62 FR 31550). Our comments relate specifically to the Fish and Wildlife Service's administration and implementation of the Endangered Species Act of 1973, as amended (Act).

Our general perceptions of the current statute and its implementing regulations are that the provisions are too general, not well explained, broadly interpreted, and have overly burdensome compliance requirements. These conditions apparently make it easy to unintentionally violate the statute, resulting in significant delays and impacts to the decision making process. They also foster "creative alternatives" to the compliance provisions, which take time and still risk successful legal challenge. We support a revision of the implementing regulations that has the overall effect of restricting broad interpretations of provisions through clear and precise defining of terms and concepts.

The spirit of Secretary of the Interior Bruce Babbitt's 10-Point Plan and other efforts to make the Act work better involves opening up the process to ensure the best scientific information is used in decision making and to get stakeholders more involved in the process. The uncertainty of which public involvement strategy or situation may be construed as a violation of the formal requirements regarding advisory committees under FACA has caused our offices to be very cautious in getting input from the public to the detriment of mutually beneficial solutions. The following are specific examples:

> In an effort to pull together the best available scientific information relating to whether or not the Alabama sturgeon warranted listing, experts on the subject were invited to address several questions concerning the sturgeon's status. Opponents to listing the sturgeon

successfully challenged the Service's means of acquiring the information as a violation of FACA; thus, we were precluded from using the findings of the experts in the decision to list or not list.

Botanists throughout the Southeastern United States met periodically to discuss the status of plants and their relative priority in terms of the need for protection under the Act. This was an excellent, cost effective means of assessing the best available information as the basis for future listing actions. Those meetings are no longer held for fear of violating FACA.

We would like to use the forum of the multi-interest partnerships, such as the Mobile River Basin Aquatic Ecosystem Coalition, as an effective means to conduct prelisting coordination, recovery planning, and habitat conservation planning on an ecosystem basis, but we are hesitant to do so because of our uncertainty over what constitutes a FACA violation.

Revised regulations are urgently needed to provide the clarity needed to overcome these obstacles to improve stakeholder involvement in Federal planning and decision making.

We appreciate the opportunity to provide comments and would like to be included in the mailing list for materials that provide FACA guidance to Federal agencies. If you have any questions regarding our comments, please feel free to contact Ms. Gloria Bell at 404/679-7100.

Sincerely yours,

(b) (6)

Marvin E. Moriarty
Acting Regional Director

UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20555-0001

OFFICE OF THE
GENERAL COUNSEL

July 10, 1997

Committee Management Secretariat
General Services Administration
Office of Governmentwide Policy, Room 5228-MC
Attention: FACA Regulations
1800 F Street, NW
Washington, DC 20405

Gentlemen:

This is in response to your Advance Notice of Proposed Rulemaking (ANPR), published in the Federal Register of June 10, 1997, concerning the revision of the General Services Administration's regulations that implement the Federal Advisory Committee Act (FACA). We would welcome such a revision, not only because some provisions in the current regulations are outdated, but also because as our agency has gained more experience in operating under the FACA, we have had to face a number of questions that are not answered by the current regulations. A list of issues that we would like to see addressed is enclosed with this letter.

The ANPR states that you anticipate that the new regulatory guidance will be divided into two parts: a part that addresses FACA's statutory requirements and policy provisions in a conventional regulation format, and a part that provides guidance on issues and situations that elaborate on the Act's policy provisions, with pertinent examples and cross references. I agree that providing examples and cross references would be very helpful. In terms of format, however, I believe that it would be more useful to FACA practitioners to combine the conventional regulations and the guidance material into one part. We have in mind something like the format of the regulations on Standards of Ethical Conduct for Employees of the Executive Branch, 5 C.F.R. Part 2635.

Finally, you asked for examples of situations where FACA was either a useful tool or a hindrance to public involvement in Federal decisionmaking. While we do not have a specific example to cite, we have on occasion been informed by NRC Staff that the procedural requirements of the FACA (e.g., chartering, recordkeeping, and reporting) are a disincentive to including members of the public in a group whose objective is to formulate advice or recommendations to the Commission. (We realize, of course, that the FACA itself contains some of the requirements.) In addition, FACA's openness requirements have sometimes been cited as a stumbling block to fully candid discussions between

7/14/97

members of a group. However, the NRC itself has a general openness policy that is independent of the FACA requirements.

Sincerely,

(b) (6)

James A. Fitzgerald
Assistant General Counsel for
Legal Counsel, Legislation
and Special Projects

Enclosures: NRC Staff Comments

ENCLOSURE

NRC STAFF COMMENTS IN RESPONSE TO

ANPR ON REVISION OF FACA REGULATIONS

NRC STAFF COMMENTS IN RESPONSE TO
ANPR ON REVISION OF FACA REGULATIONS

Issues we would like to see addressed in addition to those already listed in the ANPR:

1. It would be useful to have more guidance on closing advisory committee meetings to discuss internal organizational issues and personnel issues. For example, do discussions regarding a committee's budget fall within the ambit of internal organizational issues?

2. The FACA and the GSA implementing regulations were written for a world in which decisive Government work was done almost entirely on paper. Guidance is needed on public participation and recordkeeping requirements in the context of modern communications technology (e.g., videoconferencing, conference calls, and e-mail exchanges).

3. The role of consensus in defining "advisory committee" needs to be clarified.

4. Clarification would be useful regarding the applicability or nonapplicability of FACA requirements to meetings between agency employees and agency contractors or licensees.

5. Clarification of the role of the Committee Management Secretariat would be helpful. For example, the current regulations are ambiguous regarding the Secretariat's function with respect to charter review. (In this regard, also see #8, below.)

6. Guidance is needed regarding FACA applicability to situations in which there are a series of meetings scheduled between employees of a Federal agency and interested outside parties (e.g., industry representatives) for the purpose of trying to arrive at an agreement on, say, what should be the content of a regulation that will, if agreement is reached, be recommended for adoption by an agency decisionmaker.

7. More explicit guidance is needed on what is a "subcommittee." For example, is the FACA applicable to communications (in person or by telephone, e-mail, or letter) between advisory committee members to discuss informally issues that will come before the committee?

8. Ways should be sought to simplify FACA procedural requirements, insofar as the statute will allow. For example, the Act requires the filing of a charter with GSA and certain others, but it does not contain any express requirement for charter review by any agency outside of the agency that is establishing the committee. Where it is desirable to form an advisory committee quickly, it would save time and resources if most of what is now in section 101-6.1007 of the GSA regulations were eliminated. This would also expedite the renewal cycle that occurs every two years.

Author: "william keener" <rwkeene@envc.sandia.gov> at internet
Date: 7/11/97 8:25 AM
Priority: Normal
TO: vincent vukelich at GSA-MC
Subject: Re: FACA rulemaking -Reply

Thanks for your response to my message.
I hope I'll be on your mailing list for the packet to come later.
My one comment at this point would involve compensation to volunteer board members. It was our experience in Albuquerque that those who most wanted compensation were the paid, full-time activist group members. While we can see the occasional need to pay a board member in order to have a group represented on a board, we urge you not to weaken the current restrictions in any way that will allow activist groups federal funding for these activities.
Thank you.
Will Keener

Author: "jerry j magee" <jmagee@or.blm.gov> at internet
Date: 7/11/97 3:10 PM
Priority: Normal
TO: vincent vukelich at GSA-MC
CC: lfrewing@or.blm.gov at internet, menzer@amfor.org at internet
Subject: Proposed FACA revisions

I've just returned from extended time away and rec'd Maia Enzer's messages regarding the proposed rulemaking you're engaged in regarding FACA. Basically, I hope that the proposed rulemaking clearly reminds us what FACA was intended to either ensure or correct, and that it takes steps to meet that original purpose while at the same time mitigating the unintended consequences to public involvement and intergovernmental relations critical to successful ecosystem-based management of our nation's public lands.

I was first confronted with FACA through my involvement with the President's Forest Ecosystem Plan in 1993. I was the BLM representative to the Other Government Coordination Workgroup, which sought a strategy for involving States and Tribal gov'ts as "partners at the table" in implementing this ecosystem-based Plan. As you probably know, the original Regional Interagency Exec Committee, which included reps from States and Tribes, fell into chaos and lost a great deal of progress when confronted w/ FACA restrictions following a disgruntled special interest threat. I believe those obstacles have been surmounted, both thru the establishment of the Intergovernmental Advisory Committee for NW Forest Plan implementation and w/ rulings or changes related to FACA regarding relationships with State, county and Tribal gov'ts.

FACA again became an issue in my work as a member of the Interagency Watershed Analysis Coordination Team responsible for developing a process for analyzing ecosystems at the watershed scale to provide better ecosystem context for project design and analysis. We envisioned that watershed analysis could involve direct participation of diverse landowners and interests within the watersheds, especially since the decisions/actions of the various landholder s
could have physical influence over the success of Federal actions within that shared ecosystem. Some have construed such direct involvement as potentially running afoul of FACA and have used this concern to severely limit public involvement in their watershed analyses. I, on the other hand, cannot believe that participation in an analysis, rather than a decisionma king,
process by people who potentially have physical influence over the success of our actions within ecosystems that we share could be construed as "undue influence" over Federal decisionmaking. I believe that some attention to distinctions between analysis and decisionmaking activities could greatly assist agencies with interpreting and complying w/ FACA. The issue continues to come up as new Forest Service and BLM regions adopt the Watershed Analysis Guide for use in the Interior Columbia Basin and beyond.

I'm sorry these comments are late. I look forward to reviewing the proposed rulemaking when it is published for formal review.

Thank you for the opportunity to comment.

--Jerry Magee, BLM OR/WA Environmental Coordinator, PO Box 2965, Portland, OR, 97208, Telephone (503) 952-6086

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

JUL 14 1997

OFFICE OF
SOLID WASTE AND EMERGENCY
RESPONSE

Committee Management Secretariat
General Services Administration
Office of Government-Wide Policy
Room 5228-MC
1800 F Street NW
Washington D.C. 20405

Attention: FACA Regulations

Thank you for the opportunity to comment on the Advance Notice of Proposed Rulemaking regarding the Federal Advisory Committee Act (FACA) revisions.

The U.S. Environmental Protection Agency's Superfund program is particularly interested in commenting on this rulemaking because we are statutorily required to seek the public's input into our site cleanup decisions. One way in which we seek the public's input is through Community Advisory Groups (CAGs). As you will see from the enclosed "Guidance for Community Advisory Groups at Superfund Sites," these groups are intended to represent the diverse interests of a community. In addition, they notify the broader public of the opportunity to attend their meetings. To date, CAGs or similar community-based groups providing input into Superfund cleanup decisions have not been required to be chartered under FACA or burdened with FACA regulations.

We agree with GSA's assessment that "there is no clear answer to when a public involvement strategy or situation may 'trigger' the formal requirements regarding advisory committees under the Act." We believe community-based groups working together to solve local environmental problems should not be subject to FACA. Requiring such groups to be chartered under FACA or burdened with FACA regulations could be a disincentive to forming such a group. These groups have provided valuable input to EPA, and therefore, we recommend CAGs and other similar forms of public involvement not fall under FACA.

Thank you for consideration of our comments. If you have any questions about the CAGs established under Superfund, please contact Leslie Leahy at 703-603-9929. In addition, please add the following Superfund staff to your mailing list for materials regarding FACA Regulation revisions:

Suzanne Wells 5204G
USEPA
401 M Street SW
Washington D.C. 20460

Sincerely,

(b) (6)

Suzanne Wells, Director
Community Involvement and Outreach Center

cc: Hale Hawbecker, OGC
Elaine Davies, OERR

DEPARTMENT OF HEALTH & HUMAN SERVICES

Public Health Service

National Institutes of Health
Bethesda, Maryland 20892

MEMORANDUM

31 Center Drive
Room 3B-59
20892-2134

DATE: July 21, 1997

TO: Mr. Vincent Vukelich
Committee Management Secretariat,
General Services Administration

FROM: Committee Management Officer,
National Institutes of Health

SUBJECT: Revision of the General Services Administration's Regulations on the Federal Advisory Committee Act

We appreciate the opportunity to provide comments on the current General Services Administration Regulations (the GSA Rule) governing Federal advisory committees. The attached recommendations for change are submitted on behalf of the entire National Institutes of Health (NIH) staff including program managers, designated federal officials and committee management staff. The NIH has the majority of advisory committees within the Executive Branch, utilizing 143 committees (37 non-discretionary and 106 discretionary committees). Therefore, administering the Rule, providing input for enhancing the Rule, and adhering to the FACA is very important to us. Also important to us and consistent with Vice President Gore's National Performance Review (NPR) initiatives, is the ability to look at what we do with a view towards streamlining or eliminating redundant or outdated policies, processes and procedures.

We are taking this opportunity to make a case for the exclusion through the GSA Rule of NIH's scientific and technical peer review groups (Initial Review Groups) from coverage by the FACA. As discussed below and in the accompanying material, these advisory committees are unique in that they are primarily responsible for providing scientific and technical peer review mandated by law. The exclusion would be implemented through our recommended changes to Section 101-6.1004.

Currently, the GSA Rule encompasses all advisory committees that serve under the NIH peer review system. Sections 402, 405, 406, and 492 of the Public Health Service Act set forth the basic tenets whereby the NIH has established a hierarchy of committees with specific reporting requirements to provide advice necessary to equitably support biomedical research. Legislative provisions encourage Initial Review Groups to meet in closed session. Review of grant applications and contract proposals containing confidential information warrants closure of such meetings to protect the rights of the applicants [Government in the Sunshine Act]. For this reason, approval is given for every

Initial Review Group to meet in closed session. This mandated practice renders moot one of the central provisions of FACA, that "each advisory committee meeting shall be open to the public."

NIH's Initial Review Groups are uniquely composed of scientific experts that provide to an advisory council, opinion regarding the scientific and technical merit of individual grant applications or contract proposals. They provide critical expertise in gathering information and analyzing relevant issues and facts for later deliberation by the advisory council. The integral role that NIH advisory councils play in providing a final recommendation to an officer (an NIH Institute Director), as well as representing a forum for public input fully meet the objectives of the FACA. The contrasting purpose of the Initial Review Groups providing individual non-consensus opinion to non-government employees (the advisory council) as a result of a closed meeting to assess scientific and technical merit of pending applications warrants the exemption of Initial Review Groups from FACA.

The attached proposal addresses NIH's recommendation for exemption of Initial Review Groups in more detail as well as suggesting other provisions of the Rule that could be eliminated, streamlined or modified. We support the GSA in making every effort possible to minimize the layers of review for any aspect of committee function whether it be charters, member appointments, etc. Any administrative requirements that are not clearly mandated by the FACA should be eliminated. We hope that GSA will take advantage of any possible flexibility in interpretations that would allow Executive Branch agencies relief from some of the burdens and costs associated with the FACA and to delegate to the agencies anything that can be delegated under the law.

Again, we thank you for the opportunity to provide our comments. If you have any questions concerning the information provided in this document, please do not hesitate to contact me. I can be reached by telephone at (301) 496-2123, by fax at (301) 402-1567 or by e-mail at StringfL@od31m1.od.nih.gov. We also offer our assistance to you in rewriting or making other revisions to the Rule.

(b) (6)

LaVerne Stringfield

Attachment

cc: Dr. Vida Beaven

COMMENTS ON REVISION TO GSA RULES

Section 101-6.1003 Definitions

Include the definition of "Agency".

Rationale: All applicable definitions will be contained in the one document rather than having to reference another document.

Include a definition/discussion of "Meeting".

Rationale: There is a need to address specifically what is a meeting and how it can be opened, in the context of the various electronic means for holding a meeting. We suggest a discussion in the Rule on what constitutes a meeting even if it is held by electronic means, e.g., Internet chat rooms, teleconferencing, e-mail, and any other technological advancements that may be used to provide consensus advice.

Section 101-6.1004 Examples of advisory meetings or groups not covered by the Act or this subpart

Add new subsections (m) and (n) as follows:

(m) Any group convened to provide exclusively scientific or technical advice or recommendations.

(n) Any scientific or technical peer review group whose primary function is to assess the performance of, or the merit of applications for grants, training, fellowships, cooperative agreements, contracts, or other assistance awards for research, development, research training, construction, or the development or demonstration of research resources and mechanism for disseminating research results. [1]

Rationale: Scientific peer review committees should be exempted from regulation under the Federal Advisory Committee Act (FACA) because scientific peer review groups do not offer *consensus* advice. According to the GSA, the Act applies when an agency accepts the deliberations of a group as a source of *consensus* advice. Additionally, "The Federal Advisory Committee Act and Good Government" Report to the Administrative Conference of the United States (September 15, 1995) Steven P.

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[1]This language was agreed upon by the Interagency Ad Hoc Working Group on Scientific and Technical Peer Review Groups and the GSA Focus Group on Peer Review

Croley and William F. Funk Section V. Specific Recommendations, included the following:

> "1. Peer review committees providing exclusively technical advice or recommendations, such as those convened by the National Institutes of Health and the National Science Foundation, should be understood not to be covered by the Act. On policy grounds, the case for administering peer review outside of the FACA is especially strong for those peer review committees whose meetings are routinely closed, and whose deliberations and reports routinely fall within Sunshine and FOIA exceptions, as contemplated by subsections 10(b) and 10 (d) of the Act. Chartering such committees, whose missions do not implicate broad, substantive policy issues, creates administrative burdens without sufficient offsetting openness or participation benefits."

On March 4, 1995, President Clinton, in a memorandum for Heads of Departments and Agencies, Subject: Regulatory Reinvention Initiative, stated the following:

"We will also begin drafting legislation that will carve out exemptions to the Federal Advisory Committee Act to promote a better understanding of the issues, such as exemptions with State/local/tribal governments and with scientific and technical advisors." However, we believe that scientific and technical review groups can be exempted through the GSA Rule.

The NIH has a dual review system, with scientific peer review as the first level, and National Advisory Councils or Boards as the second. The first level, scientific peer review, is governed by regulations codified at 42 CFR Part 52h, "Scientific Peer Review of Research Grant Applications and Research and Development Contract Projects." These regulations govern the selection and appointment of peer review groups, their terms of service, and both financial and personal conflict of interest and the appearance of conflict of interest. In addition, 42 CFR 52h.6 states that public availability of specific documents made available to or prepared for or by a peer review group are governed by the Freedom of Information Act (5 USC552) as well as the Privacy Act (5 USC 552a) and implementing Department of Health and Human Services regulations (45 CFR Parts 5, 5b). Scientific peer review meetings are closed to the public in accordance with the Government in the Sunshine Act [5 USC 552b(c)(4)]. The monitoring of the gender and minority composition of all scientific review groups is important. Therefore, this monitoring would continue and a special internal policy announcement will be made, consistent with NIH internal policy regarding inclusion of women and minorities in research populations.

In the conduct of scientific peer review groups, great care is taken to have each reviewer offer an independent opinion. While there is discussion among reviewers at the meeting, all assignments of ratings (scores) is done privately and given only to the Scientific Review Administrator. In addition, when the advice of the committee

members is shared with program staff, individual unaltered critiques as written by individual reviewers are provided.

A priority score is derived for each grant application from the individual reviewers' scores, and is then percentiled in order to interdigitate applications from the various scientific review groups. The matrix of scores produced come from many different scientific peer review groups for any given Institute or Center (I/C) program. Realizing the relative imprecision that results from this interdigitation of scores from many disparate review groups with vastly different scoring behaviors, I/C program staff can only use the resulting priority scores and percentiles as very general guidance on relative scientific merit. This general guidance is provided by I/C program staff along with additional information regarding needs for portfolio balance, program relevance, and scientific priorities, to I/C National Advisory Councils or Boards. These councils are FACA committees which do offer consensus advice; votes are taken regarding funding recommendations, taking into account all of the information provided by I/C staff, including the guidance from scientific review groups.

Funding decisions thus are not made by accepting the advice of scientific peer review groups as consensus advice. Grant awards are not made simply based on the ranked list by priority score and percentile which result from review meetings. Rather, advisory councils or boards offer consensus advice to the IC Director based on scores, percentiles, scientific priorities, program relevance and portfolio balance. Thus, the Advisory Councils and Boards, not the Initial Review Groups, provide advice to the Federal officials. The function of the Initial Review Groups in relation to the Advisory Councils is the same as fact-finding groups that are exempted under section 101-6.1004 of the current GSA Rule.

Having scientific review committees operate under the FACA also creates unnecessary reporting requirements:
(1) Announcement of meetings: All scientific peer review meetings are closed due to the confidential nature of the materials discussed. The only public portion of the review meeting is a 10-15 minute standard reviewer orientation at the beginning of the meeting, which presents information available from many other sources. Because the meetings are closed, members of the public cannot attend; thus, public announcement of the meetings in the Federal Register serves no useful purpose. In addition, the dates of the meetings are posted on the NIH World Wide Web pages for public access, which serves to inform investigators of the timing of the review of their applications.
(2) Minutes of the meetings: The minutes of the meetings contain essentially the number of grant applications reviewed and aggregate funds requested for those applications; number of applications scored, unscored, and deferred; and aggregate dollars recommended for scored applications. All of the information is retained in NIH databases, but is rarely requested. Thus, the production of minutes for scientific review meetings consumes valuable resources, serves no useful purpose, and duplicates requirements of other regulations.

Section 101-6.1009 Responsibilities of any agency head

Change subsection (d) to read as follows:
(d) The reasons for closing any advisory committee meeting to the public are consistent with the provisions in the Government in the Sunshine Act and the Federal Advisory Committee Act.

Rationale: This would eliminate the redundant requirement to provide a written determination stating the reasons for closing any advisory committee meeting to the public.

Change subsection (e) to read as follows:
(e) In conjunction with the President's Annual Report to Congress, a review of the need to continue each existing advisory committee, consistent with the public interest and the purpose or functions of each committee

Rationale: This is consistent with current practice and would clarify that a separate annual review is not required.

Section 101-6.1015 Advisory committee information which must be published in the Federal Register

Revise subsection (a) Committee establishment, reestablishment, or renewal, first sentence of (1) as follows:
(1) A notice in the Federal Register is required when an advisory committee, except a committee specifically directed by law or authorized by law or established by the President by Executive Order, is established, used, reestablished, or renewed.

Rationale: This would add "authorized by law" and clarify instruction.

Revise subsection (b) Committee meetings, (1) as follows:
(1) The agency or an independent Presidential advisory committee shall publish a notice in the Federal Register and, in addition, may use other appropriate notification mechanisms that would insure public notice at least 15 calendar days prior to an advisory committee meeting. If all or part of the meeting is closed, the notice shall include the reasons why, citing the specific exemptions of the Government in the Sunshine Act (5 U.S.C. 552(b)) as the basis for closure.

Rationale: FACA section 10(a)(2) requires that "timely notice of each such meeting shall be published in the Federal Register, and the Director shall prescribe regulations to provide for other types of public notice to ensure that all interested persons are notified of each such meeting prior thereto." GSA's regulations specify a minimum of 15 days notice in the Federal Register but do not address other types of notice to insure that interested persons are notified. In addition, the regulations specify

numerous items that must be included in such notice. Agencies need to be able to "pick their own tools" to meet the spirit of the law, recognizing that indeed the public has the right to know from whom the government is seeking advice and that the advice is balanced. However, there is a need to develop a new structure for public involvement. Whether that is the publication of generic notices that certain types of recurring meetings are being held, including point of contact for further information, providing notification in specific journals for targeted audiences, or posting on the world wide web, agencies need to be allowed flexibility to utilize alternative methods of "public notice" of meetings in lieu of publication in the Federal Register.

Also, consistent with this proposal, "The Federal Advisory Committee Act and Good Government" Report to the Administrative Conference of the United States (September 15, 1995) Steven P. Croley and William F. Funk Section V. Specific Recommendations, included the following:

> "8. The GSA should promulgate regulations permitting agencies to employ targeted notice techniques, allowing agencies to exploit new technologies such as electronic bulletin boards, to provide notification to interested parties of the pending establishment of an advisory committee, as well as notice of advisory committee meetings and agenda. Accordingly subsections 101-6.1005(a)(1) and 101-6.1015(b) of the General Services Administration's regulations should be amended."

Section 101-6.1025 Requirements for maintaining minutes of advisory committee meetings

Revise subsection (a)(2)(i) to delete the word 'staff'
Change subsection (a) (2) (ii) to read: Designated Federal Official
Delete subsection (a) (3).

Rationale: It is not always feasible to include the list of all agency employees attending an advisory meeting or to estimate the number of members of the public present at such meetings. We recommend that the requirement to report the name of all staff on minutes as indicated in subsection (i) be eliminated from the Rule. Staff directly involved with the meeting can be included in the minutes without a problem. However, for large meetings like our council meetings, the majority of staff attending are not directly involved with the meeting as presenters, organizers, or other staff necessary to run the meeting. Therefore, it is difficult to maintain an accurate list of attendees. For example, often during meeting breaks, more federal staff will come to the meetings and others will leave. There may be a totally different group of federal staff during an open session than during a closed session. Therefore, since this requirement is not specifically addressed by the FACA, we suggest that the referenced listing of staff in subsection (i) be removed.

Section 101-6.1027 Termination of advisory committees

Revise subsection (a) to add a new subsection (4) as follows:

(4) The requirement for termination of an advisory committee not later than 2 years after it is established, reestablished, or renewed does not apply to any advisory committee whose establishment is directed by law, authorized by law, or otherwise designated as continuing.

Rationale: Advisory committees whose establishment is directed by law or authorized by law should not be subject to this termination provision which in effect requires renewal or rechartering every two years, a labor intensive process. There are procedures in place requiring annual review of committees (President's Annual Report to Congress and OMB A-135) which should be sufficient to ensure that each existing advisory committee needs to be continued. The process of rechartering or renewing every two years is duplicative and unnecessary. At a minimum, those advisory committees established under statutory authority, whether directed by law or authorized by law, should not be subject to automatic termination, provided this does not conflict with the specific enabling legislation or committee charter.

Section 101-6.1029 Renewal and rechartering of advisory committees

Revise (a) Advisory committees specifically directed by law, delete subsection (1) and retain subsection (2), deleting the number (2) which is no longer required.

Change wording in subsection (c) to read as follows:
(c) The requirement for renewal or rechartering of an advisory committee whose duration extends beyond 2 years shall not apply to any advisory committee whose establishment is specifically directed by law or authorized by law.

Rationale: Advisory committees whose establishment is directed by law or authorized by law should not be subject to renewal or rechartering every two years since by law they are continuing committees or their duration is specified by law. Termination of these committees can only occur by legislative authority. National Advisory Councils and Program Advisory Committees must renew their charters every two years. These renewal packages are prepared in agonizing detail and usually offer no new information since the previous renewal period. If there is a situation where an National Advisory Councils/Program Advisory Committees mission has evolved in scope or research direction then an amended charter is warranted and prepared to reflect such changes. The only information provided in the National Advisory Councils/Program Advisory Committees charters that does change is the operational costs of the committee. These costs are already captured and reported on the GSA report and are available upon request.

There are procedures in place requiring annual review of committees (President's Annual Report to Congress and OMB A-135) which should be sufficient to ensure that each existing advisory committee needs to be continued. The process of rechartering or renewing every two years is duplicative and unnecessary.

If the rechartering/renewal process is not changed as recommended above, we suggest at a minimum the use of a form that could be completed with the required information and have the official who signs the charter, sign the form. If the Charter is changed in any way prior to rechartering/renewal, an amended Charter is prepared which takes care of any changes. The current procedure for amendments should remain as is.

Section 101-6.1033 Compensation and expense reimbursement of advisory committee members, staffs and consultants

Delete from subsection (a) the following second sentence from the end; and from the last sentence of subsection (b):
"Such a determination must be reviewed by the head of the agency annually."

Rationale: Section 7(d) of the FACA does not require annual review of compensation paid to advisory committee members. Adding timelines for administering pay reviews is unnecessary since the FACA clearly states that agencies cannot pay beyond the GS-18 level. Therefore, referenced statements in subsection (a) and (b) should be deleted since they are not required by the FACA.

Section 101-6-1035 Reports of advisory committees

We would like to minimize the detail in the annual GSA Report on Advisory Committees.

Rationale: Any administrative requirements that are not clearly required by the FACA or are provided in other reports should be reviewed with an eye towards streamlining Government operations. Four sections on Form T-820H Back of the GSA Report that agencies are requested to complete but are not specifically required by the FACA are as follows:

20A. Describe how the committee accomplishes its purpose by showing the effect of committee reports, advice, or recommendations on agency operations.

This information is provided annually in a separate report. The requirements of the GSA Report and the annual report of committee activities and accomplishments required by the FACA should be combined as one request annually.

20B. Describe the balance of membership in terms of points of view represented and functions performed.

Balance of membership is discussed during the nomination process used to appoint members to each advisory committee. It is also discussed during rechartering. Statistical data are also maintained and updated for female and minority participation on all advisory committees. NIH will continue to monitor gender and minority composition of committees and will be vetting for conflict of interest. This information is readily available upon request.

20C. Describe the frequency of meetings and the relevance to continuing the committee.

The frequency of meetings is listed in Block 17E on GSA Form T-820-H. Therefore, there is no need to ask for this information again on the back of this form. Information on the relevance of continuing committees is discussed in the annual OMB A-135 Report submitted by each agency before August 29.

20D. Explain why the advice or information cannot be obtained from other sources.

This information is discussed during the establishment of a new committee or during the rechartering process.

20E. If applicable, explain why it was necessary to close and/or partially close committee meetings.

All meetings are advertised in the Federal Register. Federal Register notices prepared for closed meetings are required to include a justification citing the appropriate exemption(s) from the Government in the Sunshine Act used to authorize closing of the meeting. Therefore, providing this information is duplicative and redundant.

United States Department of the Interior

BUREAU OF LAND MANAGEMENT

Arizona State Office
222 North Central Avenue
Phoenix, AZ 85004-2203

In reply refer to:
1610 (932)

July 24, 1997

Mr. Vincent Vukelich
General Services Administration
Office of Governmentwide Policy, Room 5228-MC
1800 F Street, NW
Washington, D.C. 20405

Dear Mr. Vukelich:

Thank you for the opportunity to comment on the revision on the Federal Advisory Committee Act (FACA) regulations. The Arizona Bureau of Land Management (BLM) has adopted an active public involvement process in managing public lands. We have made it a policy to work with diverse groups of individuals and agencies to develop the best possible decisions. This openness has been hindered at times by a fear of violating FACA.

It would be of great help to BLM if the following changes could be written into the revised regulations that would allow us to work with the public without fear of violating the law.

The following two paragraphs should be added to section 101-6.1004:

> It is consistent with FACA for Federal agencies to have open public meetings with diverse individuals and groups for gathering information and advice with which to make decisions. These meetings can take numerous forms such as public meetings to obtain testimony or comments or meetings in which diverse groups discuss management options and provide recommendations to the agency to assist in their decisions.
>
> These actions would not fall under the requirements of the Act as long as the groups of individuals are not appointed by the agency, receive no compensation for time or travel, their input is advice only and is nonbinding, any meeting would be open to anyone and any meeting is advertised in a newspaper(s) with circulation in the area affected by the decision.

Also, it is unclear in either the law or current regulations why the term "consensus advice" is a trigger for FACA coverage. It is very beneficial for the Bureau to work with individuals, agencies and groups to discuss land management options and agree on a preferred course of action. A collaborative approach goes a long way in eliminating or reducing litigation, protests and appeals of Bureau decisions. Reduction or prevention of litigation, appeals and protests saves a great deal of money and time for the Bureau. We strongly encourage you to rewrite the

7/30/97

consensus section to give the Bureau the greatest flexibility possible.

These simple changes would allow BLM to work more effectively with the public to manage their public lands and remove any fear of being sued for alleged violation of the law.

If you have any questions, please contact Ron Hooper at (602) 417-9511.

Sincerely,

(b) (6)

Denise P. Meridith
State Director

DEPARTMENT OF HEALTH & HUMAN SERVICES Public Health Service

Food and Drug Administration
Washington, DC 20204

8/26/97

NOTE TO: Mr. Vince Vukelich
U.S. General Service Administration
Committee Management Secretariat

Subject: Informal comments on the June 10, 1997 ANPRM

From: Lynn A. Larsen, Ph.D. (b) (6)
Center for Food Safety and Applied Nutrition/OPPSI
Food and Drug Administration

Thank you again for the annual reports and other materials that you sent to me, and for FAXing a copy of the subject Advance Notice of Proposed Rulemaking (ANPRM). Your colleague (Susan, I believe her name was) did call about her copy of the annual report, and I mailed it back to her. I trust she received it.

I realize the comments below on the ANPRM are late, and I apologize. If they cannot be considered for your current proposal, I hope that you would keep them on file and in mind for any future amendments GSA might propose to advisory committee regulations and guidance.

- I think it would be useful if the preamble to your proposal provides not only citations of adjudicated cases and other legal/legislative history that support the proposed regulations and guidance, but also information on easy access to those sources. As we have considered revisions during our review of our own Agency regulations, it has not always been easy to ferret out the basis for some provisions that are not explicitly given in the Federal Advisory Committee Act (FACA).

- It would be helpful, especially to newly assigned Designated Federal Officials and agency management, if GSA provided additional guidance on subtleties that may distinguish an advisory committee meeting from:

-- open public meetings
-- "consensus" conferences
-- meetings with multiple consultants (as contrasted with "one-on-one" meetings) as an efficiency measure

-- "public," unannounced, by-invitation-only workshops
-- other formats for public fora
-- general ad hoc meetings of a collection of individuals who, by design or happenstance, reach a consensus view or recommendations on an issue or issues

This guidance might be addressed in relation to discussions of "utilize," consultant status, or "consensus."

- Our agency is making use of an "800" telephone number and the World Wide Web, as well as other means, to provide public information about advisory committee meetings in addition to the statutorily required FEDERAL REGISTER Notice. Guidance would be helpful on the extent to which these communications mechanisms with greater public visibility than the FEDERAL REGISTER might be used to meet the spirit, rather than the letter, of the statute.

- The ANPRM suggested that the proposal might offer a definition for "full-time Federal employee." As we have reviewed our internal advisory committee policies and guidance to committee staffs, we realized that in some contexts we could not use the term "full-time Federal employee" because we had "regular" employees who worked less than 80 hours in a pay period. It would be helpful if your proposed definition addressed this issue of "regular" but less than full-time employees.

- FACA lists "drafts" as records that must be maintained. However, agendas, background materials, questions to be posed to a committee, etc. all evolve during preparation for a meeting. Likewise, post-meeting documents such as minutes and reports go through repeated drafting, review and editing. It would be helpful if you proposed to provide guidance to identify at what point(s) such draft materials cease to be "disposable, rough" documents and become "records" that must be retained.

Thank you for allowing me this opportunity to comment informally on your ANPRM. I should note that these comments are my own and do not represent any position of the Food and Drug Administration nor the position of any other members of our agency Advisory Committee Task Group.

PUBLIC

WESTERN GOVERNORS' ASSOCIATION

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Chairman

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July 2, 1997

VIA FAX

John
Marty
Mc
MV

'97 JUL 8 AM 1 16

G. Martin Wagner
Associate Administrator,
General Services Administration
Office of Governmentwide Policy
Room 5228 -- MC
1800 F St., NW.
Washington, DC 20405

Attention: FACA Regulations

Dear Mr. Wagner:

The Western Governors' Association adopted WGA Policy Resolution 97-014 *Federal Advisory Committee Act* (copy attached) at the association's Annual Meeting in Medora, North Dakota on June 24, 1997. WGA policy resolutions express the governors' collective position on significant issues and require a two-thirds vote of the governors for adoption. WGA is an Association of Governors from the eighteen western states and the three Pacific flag islands.

As expressed in the resolution before you, the Governors believe that FACA requirements have added addition costs and have limited opportunities for cooperation among the States, the Administration, Congress and those who live in the West.

The governors have noted on a number of occasions concerns about the statutes, regulations, policy and executive orders which are utilized to implement FACA. We welcome this opportunity by GSA to revise the regulations and ask that you carefully consider the points raised in the resolution as you look at the issues to be considered in revising the rule.

The governors are also ready to actively participate in any process you may utilize in addressing this important issue. Please contact me or our Wasington, DC office Director, Rich Bechtel, if additional needs or questions arise.

Sincerely,

(b) (6)

James M. Souby

Attachment 1

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Western Governors' Association
Policy Resolution 97 - 014

June 24, 1997
Medora, North Dakota

SPONSORS: Governors Symington and Romer
SUBJECT: Federal Advisory Committee Act

A. BACKGROUND

1. In 1972, Congress passed the Federal Advisory Committee Act (FACA) to regulate the numerous committees, boards, commissions, councils, and similar groups which have been established to advise officers and agencies in the executive branch of the federal government. FACA sets out a series of rigid rules, procedures and requirements that each advisory entity must follow if it is "established" or "utilized" by a federal agency.

2. Although states agree with FACA concepts of open government and public participation, states have found the requirements of FACA to be costly and burdensome. Because states, tribal and local governments have primary, exclusive or concurrent jurisdiction in the implementation of many federal laws or programs, the free flow of communication between states and federal agencies is essential. States have found that this free flow of information is adversely affected by the need to follow FACA procedures when advising or working with federal agencies and officials on the implementation of these laws and programs.

3. Due to these concerns, Congress enacted the Unfunded Mandates Act of 1995, which generally exempted from FACA federal consultations with state, tribal and local elected leaders and their representatives involving intergovernmental responsibilities or administration. Although this has helped address many of the states' concerns with FACA, these are still some problems that need to be addressed and resolved with FACA.

4. A new problem is the application of FACA restrictions to water-shed and community- based collaborative groups. The legal counsel of federal agencies such as the Forest Service have interpreted FACA as forbidding their receipt of consensus advice and recommendations from any group or committee which includes non-federal members unless the group is either chartered under FACA or specifically exempted from the Act. As a result, FACA has created an atmosphere of uncertainty about collaboration among federal officials and community-based groups.

5. Natural resource issues rarely abide by political boundaries, especially in the West where federal, state, local, tribal, and private lands are intermingled and where federal and state governments share jurisdiction over activities on federal

lands. The governors have found that good stewardship and the successful implementation of laws and regulations require all affected parties to share in the identification and resolution of problems.

B. GOVERNORS' POLICY STATEMENT

1. The clarification of FACA is fundamental to ensuring the implementation and development of current and future legislation and regulations. It is essential that federal officers and agencies collaborate with state, local, and tribal officials and their representatives in the spirit of the Unfunded Mandates Act of 1995.

2. The governors support "government in the sunshine" and believe the public deserves full access to the decision making process of government. States have a variety of "sunshine" requirements in their statutes and codes of administrative procedures that apply to state-federal negotiations without limiting the quality or quantity of those discussions.

3. The governors urge Congress to amend FACA or the Administrator of the General Services Administration (GSA) to clarify GSA's regulatory definition of an advisory committee that is 'utilized' by federal agencies to comport with the line of legal reasoning set out in the Supreme Court's *Public Citizen v. U.S. Department of Justice* (491 US S.Ct. 2558 (1989)) decision and subsequent decisions of the Court of Appeals for the D.C. Circuit. Only those advisory bodies over which the agency has strict management or control should fall under FACA as being 'utilized' by the federal agency. However, the membership of independent groups that do not fall under the jurisdiction of FACA, but in which federal agencies participate, must be balanced in terms of the points of view represented and the functions to be performed. They must operate in an open and accountable manner without being subject to the formal application of FACA.

   Whenever possible federal agencies should work with consensus, problem-solving groups like Endangered Species Act recovery plan implementation and conservation teams and independent water-shed councils and coordinated resource management committees. Federal agencies must collaborate if they are to successfully carry out their responsibilities and to tailor the implementation of their laws and regulations to the on-the-ground circumstances of the area where specific problems occur.

4. Advisory committees that are "established" by federal agencies also need to be addressed in a more flexible manner. While various directives from the Clinton Administration like Executive Order (EO) 12875 have mandated enhanced collaboration with stakeholders, EO 12838 regarding FACA makes collaboration difficult. The EO seeks to reduce the proliferation of advisory committees by requiring their establishment to be approved by the agency head and the director of the Office of Management and Budget. It also limits the creation of new advisory committees to only those instances when such important considerations as national security or public health or safety dictate them. National, regional, and local offices need the help of collaborative, short-term advisory bodies that are not captured by one point of view. This decision making should be decentralized. The Executive Order and FACA should be amended to allow the appropriate level of government to decide whether to establish an advisory committee. Agency heads should be able to establish national advisory committees without the approval of the heads of GSA and OMB. Agency regional directors should be able to establish regional and local advisory groups. Notice of their establishment should be in the *Federal Register* and provide a notice mechanism for enabling interested parties to be informed of individual meetings without requiring meeting notices to be published in the *Federal Register*.

C. GOVERNORS' MANAGEMENT DIRECTIVE

1. WGA staff is instructed to implement this policy by working with appropriate federal officials and congressional leaders.

Note: This policy resolution was originally adopted by the western governors in 1994 as 94-001. It was modified and readopted in 1997.

Author: jdn@karnopp.com at internet
Date: 7/2/97 3:03 PM
Priority: Normal
TO: vincent vukelich at GSA-MC
Subject: FACA Regulations

I represent the Warm Springs Tribes in Oregon. The primary FACA problems we have had are related to the development of Wild and Scenic River plans for several rivers in the Deschutes River Basin. In particular, the Forest Service has been reluctant to engage in cooperative planning efforts because of FACA. The 1995 amendment does not squarely address the issue for a variety of reasons -- non governmental parties are included, the effort is directed at developing and agreeing upon a comprehensive management plan and not just exchanging views, etc. We view the meetings as government to government negotiations involving an exercise of the U.S. trust responsibility to the Tribes. In our view, FACA has resulted in the Forest Service isolating itself from the Tribe and the public in general. It's an easy way for them to refuse to meet with people, retreat to their offices, and do whatever they want with little true public involvement. In addition, because the agency has been sued in the past, the Forest Service lawyers have generally taken the easy path and simply said that FACA prevents the meetings without critically analyzing FACA to see if there is a reasonable way to accomodate the situation. The BLM, in contrast, has taken a much more sensible approach. Jim Noteboom jdn@karnopp.com 1201 NW Wall St., Suite 300, Bend, Oregon 97701. 541-382-3011.

PUBLIC CITIZEN LITIGATION GROUP
1600 20TH STREET, N.W.
WASHINGTON, D.C. 20009-1001
—
(202) 588-1000

July 3, 1997

Vincent Vukelich
Committee Management Secretariat
General Services Administration
Office of Governmentwide Policy
Room 5228-MC
1800 F Street, N.W.
Washington, D.C. 20405

Re: FACA Regulations

Dear Mr. Vukelich:

I am writing on behalf of Public Citizen -- a non-profit public interest advocacy organization founded by Ralph Nader -- to submit comments on the proposed revision of the Federal Advisory Committee Act ("FACA") regulations as announced in the Federal Register on June 10, 1997 at 62 Fed. Reg. 31550. We support revision of the FACA regulations, and focus here on those aspects of FACA that we believe are most in need of clarification and strengthening.

In 1989, Public Citizen published a comprehensive report on the three most serious problems with FACA: (1) inadequate requirements for the reporting of conflicts of interests by advisory committee members; (2) confusion concerning the meaning of FACA's balanced representation requirements; and (3) confusion concerning the threshold coverage of FACA, particularly with regard to committees that are being "utilized" but have not been formally established by the government. Despite the passage of eight years, these problems are as pressing today as they were in 1989. Each of the problems is not only significant in its own right, but, in combination, they make it virtually impossible for members of the public to guard against the kind of abuse of the advisory committee process that FACA was fundamentally intended to eliminate -- the domination of committees by representatives of industry, who are thereby afforded a special opportunity to influence federal policy on matters in which they have a vested economic interest but which are also of vital concern to the public. These problems have not been addressed in the nearly eight years since the publication of our report, and continue to be the three areas in greatest need of reform. Therefore, we have enclosed a copy of our report "The Federal Advisory Committee Act at the Crossroads, Needed Improvements in the

7/7/97

Regulation of Federal Advisory Committees," which describes in great detail the problems related to conflicts of interest, balanced representation, and the threshold coverage of FACA. GSA's revision of the FACA regulations should address these three key problems.[1]

A related issue of concern is the failure of the current regulations to ensure that advisory committees limit their work to the areas spelled out in the group's charter. For example, in 1995, the National Motor Carrier Advisory Committee ("NMCAC"), an advisory committee to the Federal Highway Administration, passed a resolution at the behest of its trucking industry members accusing a political opponent of the industry of making untrue statements in a fundraising letter concerning the North American Free Trade Agreement ("NAFTA"). The resolution was then used by an NMCAC member in a full-page advertisement in the influential Capitol Hill newspaper Roll Call to discredit the organization: "STOP," urged the advertisement, "The next time Joan Claybrook and Citizens for Reliable and Safe Highways (CRASH) try to tell you about highway safety, first read this resolution adopted by the U.S. Federal Highway Administration's official advisory committee." Advisory committees should not be free to pursue the parochial political agendas of their members by adopting resolutions denouncing the credibility of rival organizations. FACA was designed to protect against just such special interest influence and to prevent the hijacking of the advisory committee process that occurred in the NMCAC situation, and the regulations should be revised to ensure that similar situations do not occur again.

One way to ensure that advisory committees stick to the mission spelled out in their charters is to clarify the role and responsibilities of the designated federal official who is supposed to supervise advisory committee meetings and dictate the matters to be considered and the nature of the actions that may be taken. Under section 2(b)(6) of FACA, "all matters under" an advisory committee's consideration "should be determined, in accordance with law, by the official, agency or officer involved." Each meeting of an advisory committee must be chaired or attended by a designated government officer or employee. 5 U.S.C. App. II, § 10(e). The government officer or employee must call or approve of each meeting and must, in advance of each meeting, also approve the agenda. 5 U.S.C. App. II, § 10(f). These two latter provisions are included "for a basic purpose: to assure that a Federal official will be available at all times to supervise and monitor the activities and discussions of the committee members, and particularly to guard against possible antitrust violations and conflicts of interest." S. Rep. No. 92-1098,

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[1]Because the report was written in response to proposed legislation, it offers specific legislative rather than regulatory solutions. However, many of the suggested reforms can be accomplished through regulation and should be considered by GSA during the revision process.

at 17. This supervision of advisory committee meetings by a government official is "added insurance against potential abuse of the advisory privilege." Id. Despite these requirements in the Act, however, the designated federal official at the NMCAC meeting described above allowed the committee to introduce and vote on a resolution that was not on the agenda despite its clearly private and political purpose. The revisions to the FACA regulations should clarify how federal officials should respond to similar situations.

The Federal Register notice states that some groups may perceive FACA as hindering public involvement in Federal decisionmaking, rather than facilitating public participation as was Congress's intent. The problem, to the extent it exists, however, is not the public participation requirements of FACA, but the hurdles that have been set up by the agencies and the White House to chartering advisory committees. Thus, it is not that agencies or those groups from which they seek advice object to holding open meetings or to providing public access to the records generated from their meetings. Rather, it is the fact that chartering an advisory committee takes many months and many bureaucratic maneuvers which leads to agency decisions not to involve the public. Therefore, it is important that the regulatory revisions remove the current disincentives in the chartering process. If the chartering process is straightforward and easy to comply with, agencies will not be hampered in their efforts to involve the public in the decisionmaking process.

The Federal Register notice fails to mention the recent D.C. Circuit decision in Animal Legal Defense Fund v. Shalala, 104 F.3d 424 (D.C. Cir. 1997), which found that a National Academy of Sciences committee is subject to FACA because it is "utilized" within the meaning of the statute. This case is likely to be heard by the Supreme Court, and therefore, any revisions to the FACA regulations concerning "utilized" committees should be put off until the Supreme Court finally decides the case.

Finally, we encourage GSA to involve the public to the greatest extent possible in the revision process. We welcome the opportunity to participate as the proposals for revisions are developed.

Sincerely,

(b) (6)

Lucinda Sikes

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July 8, 1997

Committee Management Secretariat
General Services Administration
Office of Governmentwide Policy, Room 5228--MC
1800 F St., NW
Washington, D.C. 20405

ATTENTION: FACA REGULATIONS

Dear Sir/Madam:

The American Farm Bureau Federation (AFBF) appreciates the opportunity to offer comments relating to the Advance Notice of Proposed Rulemaking on Federal Advisory Committee Act (FACA) management. AFBF is the largest general farm organization in the United States, representing the interests of more than 4.7 million member families. AFBF has affiliated state Farm Bureaus in all 50 states and Puerto Rico.

Farmers and ranchers are impacted by the uncertainty surrounding the application of FACA to various projects. As natural resource issues become more contentious and interests become more polarized, farmers and ranchers have found that they can find common ground on these issues at the local level. Also, as the scientific information supporting natural resource decisions becomes more complex and diverse, there is a need to sort through the conflicting information to reach the right decision. The application of FACA to both of these processes would severely restrict their utility.

FACA seeks to prevent secret insider influence on government agencies by providing a formalized procedure for the establishment of advisory groups. The procedure ensures that meetings are open, and representation on the advisory panels is balanced among various points of view. FACA serves a very legitimate and integral role in ensuring that our democratic form of government remains open to the public and to different points of view. It helps keep our democracy democratic.

But these same formalized procedures, coupled with a broad interpretation of FACA provisions, threaten to undermine the open and participatory government that it was designed to promote. It seems to be on a collision course with the collaborative approaches to natural resources management proposed by the President's Council on Sustainable Development. There is an air of uncertainty about whether the provisions of FACA must be satisfied for the most basic forms of citizen participation in government. We are pleased that the General Services Administration

7/8/97

is undertaking this review of FACA regulations in order to make them more responsive to FACA's intended purpose. We also believe that needed reforms should be able to be accomplished through clarified regulations, so that amendments to FACA would not be necessary.

Following are some examples of how FACA may have unintended negative impact on the processes of government, and how the proposed regulations might resolve these impacts:

1. Coordinated Resource Management (CRM).

Coordinated Resource Management is a process in which local situations are resolved by local residents--the purest form of open and collaborative government. It has been used effectively to address natural resource issues on both public and private lands, and is growing in popularity and in use. Farmers and ranchers who took a "wait and see" attitude on CRM now embrace it.

CRM is a voluntary process that is generally initiated by a landowner or land user. It invites all different points of view, including federal and local governmental personnel, to participate in a cooperative manner. The goal of the group is to provide input and/or management to address controversial issues. On federal lands issues the CRM process is used to recommend courses of action that have the support of the local community, with the federal agency necessarily being the final decision-maker. Federal agencies that are involved in the process will execute a Memorandum of Agreement (MOA) with the CRM group by which the agency agrees to abide by the outcome of the CRM process. The MOA distinguishes the CRM process from other valuable and useful citizen advisory processes that are active at all levels of government. CRM decision-making must be by consensus--everyone must be willing to support the decision or else there is no decision.

The CRM process must necessarily be flexible. In order to be a viable option for natural resource management, the CRM process must be capable of being implemented at local levels in a timely manner. Federal agency personnel must be able to authorize CRM use when it is requested. Since CRM is used most often on local levels, there may be many CRM projects ongoing at any one time. The rigid and formal FACA requirements for organizing, chartering and authorizing "advisory committees" would strangle the CRM process.

The CRM process could arguably be subject to the broad definitions of FACA. CRM brings together a diverse group of local people, often convened with the approval of a federal agency, to develop consensus input on an issue that will assist in agency decision-making. Many proponents of CRM, including AFBF, are concerned that FACA may be applied to CRM processes, an outcome that would severely hinder the CRM process and the ability of local people to make their own decisions.

Some federal agencies and personnel have been inhibited from participating or authorizing CRM due to possible FACA concerns. The U.S. Forest Service, one of the largest federal land

managers, has been very wary about using CRM due to the uncertain application of FACA. This concern has prevented full participation by agency personnel in many local collaborative situations.

This places FACA in the anomalous position of hindering the very thing that its enactment was designed to promote--open, honest, participatory government. It is clearly evident that Congress did not intend for FACA to deter the CRM process. The very reasons that FACA was enacted--reducing the influence of special interests and providing public equal access to policy-makers--are promoted by the CRM process. Yet the very broad and directionless language of FACA could subvert these goals.

We submit that the uncertain application of FACA to the CRM process that currently exists can be resolved through changes in the regulations so that additional legislation is not necessary. We urge the agency to provide some much-needed direction to FACA by re-focusing it to address the real problems that it was enacted to solve, and to not include processes like CRM that further FACA goals.

2. *Technical Review or "Peer Review" Panels.*

Another situation where application of FACA might hinder agency decision-making is in the use of panels to provide technical review on scientific issues. Science has become increasingly specialized and compartmentalized. In addition, technological advances have made application of scientific principles more complex. Science also seems to be becoming more policy oriented, meaning that scientific studies are often done to promote particular policy goals and not to produce objective scientific results. This leads to conflicting scientific results among scientists.

All of these factors have made it increasingly difficult to evaluate scientific evidence, and to sort out the good science from the bad. Statutes like the Endangered Species Act (ESA) require that decisions be made on the basis of the "best scientific and commercial data available," but it is increasingly difficult to determine what "the best scientific data available" is.

In such cases, the agencies have often resorted to appointment of technical review teams or "peer review" teams to evaluate the available scientific evidence from a technical standpoint. Independent scientific review of an administrative record that involves complex or conflicting scientific evidence can significantly help an agency make informed decisions. Farmers and ranchers are familiar with the use of technical review panels or peer review panels in ESA decisions, and we advocate the use of peer review panels to assist in such decisions. The Department of Interior has issued a policy statement establishing a peer review procedure for ESA listing situations.

These panels, however, could be engulfed in the broad sweep of FACA. As with CRM, technical review panels or peer review panels need to be flexible. They must address particular situations with a very limited charge and life span. It is also very important that they be convened in a

timely manner, because the ESA contains very definite time constraints on ESA decisions. By contrast, FACA authorization and chartering can take a long time. Application of FACA to these types of panels would therefore effectively preclude their use.

Regulatory direction to preclude application of FACA to these specialized situations might take the form of exempting panels that provide technical advice and applying to panels that provide policy advice. Regulatory direction could also be provided to the effect that such panels be given a very specific, technical charge that would assist the agency yet not make policy recommendations.

The most positive contribution that this FACA review and regulatory amendment process can provide is to give some direction to FACA. We submit that such direction should refocus on the original intent of FACA and to implement those goals. FACA should not impede the use of CRM as a useful management tool. It should also not restrict the use of specialized technical review panels or peer review panels when they are necessary.

We appreciate the initiative of the agency to undertake this review of the FACA regulations, and we also appreciate the opportunity to offer comments on this issue of importance to our members. We look forward to working with you to craft FACA regulations that accomplish the laudable goals of the legislation and that at the same time eliminate the uncertainty that currently hinders the use of valuable aids to the decision-making process.

Sincerely,

(b) (6)

Richard W. Newpher
Executive Director
Washington Office

SEVENTH AMERICAN FOREST CONGRESS

Communities Committee

July 8, 1997

Committee Management Secretariat
General Services Administration
Office of Government Policy
Room 5228-MC
1800 F. St. NW.
Washington, D.C. 20405
FAX 202-273-3559

Attention: FACA Regulations

Dear Committee Management Secretariat:

I am writing on behalf of the Communities Committee (Committee) of the Seventh American Forest Congress to express our general concerns about the current Federal Advisory Committee Act (FACA) regulations and to request that the Committee be added to the mailing list for further information about changes to the FACA regulations.

The Communities Committee is one of five committees of the Seventh American Forest Congress. Our mission is to foster and support community-based approaches by focusing attention on the interdependence between America's forests and the vitality of rural and urban communities. Community-based groups are place-based groups made up of diverse interests seeking common ground solutions through honest, open, inclusive, and transparent processes.

Many members of the Communities Committee have found FACA to be an obstacle to the type of collaborative efforts we believe are essential to achieve the stewardship we seek- a reciprocal relationship in which communities take care of forests and forests take care of communities. On some occasions, we believe the Act has been used inappropriately to prevent federal agencies from

Lynn Jungwirth, Committee Chairperson, PO Box 356, Hayfork, CA 96046
(916) 628-4206; FAX (916) 628-4212; Internet:lynnj@tcoe.trinity.k12.ca.us

7/8/97

participating in community-based groups. On other occasions, we suspect, the Act may have been used as an excuse for federal agencies to refrain from participating in community-based groups. In both types of cases, the effort to foster and support community-based approaches is weakened by the absence of the very officials who make key decisions about community natural resources.

Misunderstanding about the circumstances under which the law applies is widespread. The Communities Committee urges you to both clarify the regulations to comport with existing case law and to provide as much guidance as possible, through hypothetical cases, to help agency personnel and citizens understand when FACA applies and when it does not.

We are pleased the revision is underway and look forward to seeing the draft regulations.

Sincerely,

Lynn Jungwirth
Lynn Jungwirth, Chair

Lynn Jungwirth, Committee Chairperson, PO Box 356, Hayfork, CA 96046
(916) 628-4206; FAX (916) 628-4212; Internet:lynnj@tcoe.trinity.k12.ca.us

STATE OF ALASKA

TONY KNOWLES, GOVERNOR

OFFICE OF THE GOVERNOR

OFFICE OF MANAGEMENT AND BUDGET
DIVISION OF GOVERNMENTAL COORDINATION

- *SOUTHCENTRAL REGIONAL OFFICE*
  3601 "C" STREET, SUITE 370
  ANCHORAGE, ALASKA 99503-5930
  PH: (907) 269-7470/FAX: (907) 561-6134
- *CENTRAL OFFICE*
  P.O. BOX 110030
  JUNEAU, ALASKA 99811-0030
  PH: (907) 465-3562/FAX: (907) 465-3075
- *PIPELINE COORDINATOR'S OFFICE*
  411 WEST 4TH AVENUE, SUITE 2C
  ANCHORAGE, ALASKA 99501-2343
  PH: (907) 271-4317/FAX: (907) 272-0690

July 10, 1997

Mr. Vincent Vukelich
Committee Management Secretariat
Generai Services Administration
Office of Governmentwide Policy
Room 5228--MC, 1800 F Street, N.W.
Washington, D.C. 20405

Dear Mr. Vukelich:

The State of Alaska is keenly interested in efforts to refine regulations at 41 CFR Part 101-6 which address federal advisory committee management under the Federal Advisory Committee Act (FACA). We welcome this opportunity to share our views as you evaluate revisions.

The June 10, 1997 Federal Register notice acknowledges there "may ... be a perception among some groups that the broad scope of FACA actually hinders public involvement in Federal decision making." Indeed, there are instances in Alaska where the stringent and perhaps overzealous application of FACA principles has stifled sound decision making by preventing an open and collaborative public process. The 1995 statutory changes allowing collaboration with state, local and tribal officials has been most useful; however more refinement is necessary.

Federal Solicitors in Alaska routinely advise federal managers to avoid consensus based discussions that involve a range of interests, resulting in an overly cautious approach toward collaborative efforts, which are often the most productive and successful. Even if the state offers to convene an open stakeholders forum including non-governmental organizations, federal managers are leery of participating. Fortunately in Alaska, we have the FACA chartered *Alaska Land Managers Forum*, but this one entity cannot possibly cover all the land and resource issues crossing landownership jurisdictions in Alaska.

The State of Alaska recognizes the basic intent and value of the Federal Advisory Committee Act, although its implementation should be clarified to avoid self defeating results. As you may be aware, the Western Governor's Association (WGA) adopted a policy resolution on June 24, 1997, concerning implementation of FACA. The State of Alaska supports the recommendations in this policy, including the following key points summarized here from the WGA Resolution:

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7/15/97

- Limit the definition of an advisory committee that is "utilized" by federal agencies to those advisory bodies over which the agency has strict management or control. Other groups with which federal agencies participate must have balanced representation and must operate in an open and accountable manner without being subject to the formal application of FACA.

- Whenever possible federal agencies should work with existing groups which operate in a consensus based, problem-solving format.

- The process for formally establishing advisory committees should be decentralized to allow greater flexibility. Formal approval should be delegated to the federal agency heads. Approval of FACA groups should also be allowed by the agency regional director to address regional and local issues.

- Upon establishment, the notice in the Federal Register should provide for alternate meeting notice mechanisms in the affected area besides publication in the Federal Register, or perhaps in addition to the Federal Register if sufficient lead time is anticipated to accomodate FR publication.

Attached is the full text of the Western Governor's Association's Policy Resolution 97-014. If you have questions about the application of FACA in Alaska, please call me at 907-269-7477 or Raga Elim in the Governor's Washington D.C. office at 202-624-5858. Thank you for your consideration of these comments and recommendations.

Sincerely,

(b) (6)

Sally Gibert
State CSU Coordinator

cc: John Katz, Governor's Office, Washington, D.C.
Marilyn Heiman, Governor's Office, Juneau
Diane Mayer, Director, Division of Governmental Coordination
John Shively, Commissioner, Department of Natural Resources
Frank Rue, Commissioner, Department of Fish and Game
Joseph Perkins, Commissioner, Department of Transportation and Public Facilities
Michele Brown, Commissioner, Department of Environmental Conservation
William Hensley, Commissioner, Dept of Commerce and Economic Development
Deborah Williams, Special Assistant in Alaska to the Secretary of the Interior
Robert Barbee, Regional Director, National Park Service
Dave Allen, Regional Director, U.S. Fish and Wildlife Service
Phil Janek, Regional Forester, US Forest Service
Tom Allen, State Director, Bureau of Land Management

Western Governors' Association June 24, 1997
Policy Resolution 97 - 014 Medora, North Dakota

SPONSORS: Governors Symington and Romer
SUBJECT: Federal Advisory Committee Act

A. BACKGROUND

1. In 1972, Congress passed the Federal Advisory Committee Act (FACA) to regulate the numerous committees, boards, commissions, councils, and similar groups which have been established to advise officers and agencies in the executive branch of the federal government. FACA sets out a series of rigid rules, procedures and requirements that each advisory entity must follow if it is "established" or "utilized" by a federal agency.

2. Although states agree with FACA concepts of open government and public participation, states have found the requirements of FACA to be costly and burdensome. Because states, tribal and local governments have primary, exclusive or concurrent jurisdiction in the implementation of many federal laws or programs, the free flow of communication between states and federal agencies is essential. States have found that this free flow of information is adversely affected by the need to follow FACA procedures when advising or working with federal agencies and officials on the implementation of these laws and programs.

3. Due to these concerns, Congress enacted the Unfunded Mandates Act of 1995, which generally exempted from FACA federal consultations with state, tribal and local elected leaders and their representatives involving intergovernmental responsibilities or administration. Although this has helped address many of the states' concerns with FACA, these are still some problems that need to be addressed and resolved with FACA.

4. A new problem is the application of FACA restrictions to water-shed and community- based collaborative groups. The legal counsel of federal agencies such as the Forest Service have interpreted FACA as forbidding their receipt of consensus advice and recommendations from any group or committee which includes non-federal members unless the group is either chartered under FACA or specifically exempted from the Act. As a result, FACA has created an atmosphere of uncertainty about collaboration among federal officials and community-based groups.

5. Natural resource issues rarely abide by political boundaries, especially in the West where federal, state, local, tribal, and private lands are intermingled and where federal and state governments share jurisdiction over activities on federal lands. The governors have found that good stewardship and the successful implementation of laws and regulations require all affected parties to share in the identification and resolution of problems.

B. GOVERNORS' POLICY STATEMENT

1. The clarification of FACA is fundamental to ensuring the implementation and development of current and future legislation and regulations. It is essential that federal officers and agencies collaborate with state, local, and tribal officials and their representatives in the spirit of the Unfunded Mandates Act of 1995.

2. The governors support "government in the sunshine" and believe the public deserves full access to the decision making process of government. States have a variety of "sunshine" requirements in their statutes and codes of administrative procedures that apply to state-federal negotiations without limiting the quality or quantity of those discussions.

3. The governors urge Congress to amend FACA or the Administrator of the General Services Administration (GSA) to clarify GSA's regulatory definition of an advisory committee that is 'utilized' by federal agencies to comport with the line of legal reasoning set out in the Supreme Court's Public Citizen v. U.S. Department of Justice (491 US S.Ct. 2558 (1989)) decision and subsequent decisions of the Court of Appeals for the D.C. Circuit. Only those advisory bodies over which the agency has strict management or control should fall under FACA as being 'utilized' by the federal agency. However, the membership of independent groups that do not fall under the jurisdiction of FACA, but in which federal agencies participate, must be balanced in terms of the points of view represented and the functions to be performed. They must operate in an open and accountable manner without being subject to the formal application of FACA.

Whenever possible federal agencies should work with consensus, problem-solving groups like Endangered Species Act recovery plan implementation and conservation teams and independent water-shed councils and coordinated resource management committees. Federal agencies must collaborate if they are to successfully carry out their responsibilities and to tailor the implementation of their laws and regulations to the on-the-ground circumstances of the area where specific problems occur.

4. Advisory committees that are "established" by federal agencies also need to be addressed in a more flexible manner. While various directives from the Clinton Administration like Executive Order (EO) 12875 have mandated enhanced collaboration with stakeholders, EO 12838 regarding FACA makes collaboration difficult. The EO seeks to reduce the proliferation of advisory committees by requiring their establishment to be approved by the agency head and the director of the Office of Management and Budget. It also limits the creation of new advisory committees to only those instances when such important considerations as national security or public health or safety dictate them. National, regional, and local offices need the help of collaborative, short-term advisory bodies that are not captured by one point of view. This decision making should be decentralized. The Executive Order and FACA should be amended to allow the appropriate level of government to decide whether to establish an advisory committee. Agency heads should be able to establish national advisory committees without the approval of the heads of GSA and OMB. Agency regional directors should be able to establish regional and local advisory groups. Notice of their establishment should be in the Federal Register and provide a notice mechanism for enabling interested parties to be informed of individual meetings without requiring meeting notices to be published in the Federal Register.

C. GOVERNORS' MANAGEMENT DIRECTIVE

1. WGA staff is instructed to implement this policy by working with appropriate federal officials and congressional leaders.

Note: This policy resolution was originally adopted by the western governors in 1994 as 94-001. It was modified and readopted in 1997.

ADVOCATES
FOR HIGHWAY
AND AUTO SAFETY

July 10, 1997

Committee Management Secretariat
General Services Administration
Office of Governmentwide Policy
Room 5228--MC
1800 F Street, N.W.
Washington, D.C. 20405

Federal Advisory Committee Management
General Services Administration
Advanced Notice of Proposed Rulemaking
62 Fed. Reg. 31,550, June 10, 1997

Advocates for Highway and Auto Safety (Advocates) is pleased to provide comments on the General Services Administration's (GSA) advanced notice of proposed rulemaking (ANPRM) to revise the current GSA regulations on the Federal Advisory Committee Act (FACA). Advocates has long been involved in advisory committee work and has attended public sessions or reviewed the records of many committees and groups covered by FACA. Advocates' staff also has expertise in legislative and legal issues arising under FACA, as well as agency practice and conduct required by the statute. Advocates fully supports GSA's intended review of its regulations in light of legal and other developments affecting advisory committees, and we hope to assist GSA on specific changes when they are proposed.

Advocates also supports the need for more guidance to agencies regarding important FACA issues including "utilization,"

750 First Street, NE Suite 901 Washington, DC 20002 Tel: 202/408-1711 Fax: 202/408-1699
World Wide Web: http://www.saferoads.org

threshold application, "consensus," and "balance," to name just a few. Regulations on the topics announced in the ANPRM, with representative examples, would be helpful to agency committee management officers. Beyond the general need to provide regulatory clarity, however, GSA must provide some long-needed rules for the conduct of advisory committees. Advocates is concerned that too often the requirements of FACA are either entirely ignored, or that certain disagreeable aspects of the advisory committee process regarded as burdensome are evaded in order to achieve narrow political goals either of a portion of the full committee or of the agency itself. Several recent experiences with advisory committees indicate that such abuses of FACA continue to be practiced within agencies.

GSA should include in its proposed regulations stronger statements regarding the use of subcommittees, or subgroups of subcommittees, such as task forces, to perform advisory functions without holding open and public meetings or otherwise adhering to the FACA. Advocates finds that in a number of instances, subgroups or task forces are formed to gather material and information and to "develop advice" in a manner that governs the scope and context of the advice that is ultimately decided upon by the full committee. Such subgroups, often referred to as task forces or given other sobriquets, play a critical, oftentimes controlling role in the formation of advice, even if they do not

directly render the advice. These subgroups frequently do not have any semblance of balanced representation and almost always include persons and organizations other than those that are represented on the full committee. The general public often cannot obtain even the roster of persons included on such subgroups. It is in these subgroups that advisory committee members (and others) engage in the full-fledged debate over policy advice that FACA intended to be part of the public record in open hearings. It is clear from Advocates' long experience with the use of task forces and *ad hoc* subgroups within chartered advisory committees that many committee and participating non-committee members welcome the anonymity of meetings conducted out of public view, without minutes or public access to work product and records, in order to engage in substantive committee business. GSA should establish regulations for federal officials regarding subgroups and requiring strict scrutiny of such consultative bodies.

Advocates also urges GSA to craft regulations regarding committees that engage in *ultra vires* activities that are neither advisory in nature nor within the scope of the committee charter. As a member of the Department of Transportation's National Motor Carrier Advisory Committee, the President of Advocates protested the use of a Federal Advisory Committee as a platform for attacking political enemies. Motions introduced by a private

interest, also a committee member, attacking a non-member organization, were voted on by the majority of the committee. Despite Advocates' protest on this abuse of the advisory committee process, and a request to the Designated Federal Official (DFO) from the Federal Highway Administration to prevent this, nothing was done to stop the resolution despite the fact that it was beyond the scope of the committee's jurisdiction and authority and did not represent advice of any sort. We think that before this type of activity becomes endemic to FACA committees GSA should provide clear regulatory strictures that will foreswear this type of inadmissible committee action.

(b) (6)

Henry M. Jasny
General Counsel

University of Colorado at Boulder

School of Law
Natural Resources Law Center

Room 160, Fleming Law
Campus Box 401
Boulder, Colorado 80309-0401
(303) 492-1286
Fax: (303) 492-1297

July 10, 1997

Committee Management Secretariat
General Services Administration
Office of Governmentwide Policy
Room 5228-MC
1800 F St., NW
Washington, D.C. 20405

Attention: FACA Regulations

Dear Committee Management Secretariat:

The Natural Resources Law Center (Center), affiliated with the University of Colorado School of Law, seeks to improve public understanding of natural resource issues through educational activities, a visitors program, and legal and inter-disciplinary research and publications. Over the past year the Natural Resources Law Center has examined the possibility of modifying the Federal Advisory Committee Act (FACA) or the FACA rules with the twin goals of making the law and the rules more workable while maintaining their core protections for open decisionmaking. Thus, we are pleased that the General Services Administration (GSA) is beginning the process of revising the FACA regulations.

We share your view that a series of judicial decisions issued by the Supreme Court and the Court of Appeals for the D.C. Circuit have made the rules outdated. We are also pleased to hear that you intend to provide more useful guidance on the applicability of FACA.

We urge you to give special attention to revision of the definition of "utilize" in the current rules. The series of court cases discussed in the enclosed Center publication entitled "The Federal Advisory Committee Act, Rules and Executive Orders: Judicial Interpretations and Suggested Revisions" indicate that the term should be interpreted extremely narrowly. A clear definition of "utilize" together with a series of examples of when a group falls within the "utilized by" category and when it does not would be extremely valuable to agency personnel and citizen groups. There has been untold misunderstanding about the application of FACA to community-based groups, which have not been "established" by a federal agency but in which federal agency personnel participate. The series of court cases provide some good language to use as a basis for a definition of "utilize."

The Center publication on FACA suggests that some of the serious problems with FACA stem not from the rules but from either the Act itself or from Executive Order 12838. We realize that GSA does not have authority to address those concerns but we urge you to bring them to the attention of the Administration. Revision of the rules has the potential to address some of the problems created by FACA but it will be important to take the additional steps of reexamining the Act itself and Executive Order 12838.

We request that the Center be put on your mailing list for distribution of the draft rules. Again, we appreciate the fact that GSA has initiated a revision of the FACA rules. We look forward to the opportunity to comment on the draft rules.

Sincerely,

(b) (6)

Elizabeth Ann Rieke
Director

STATE OF WYOMING
OFFICE OF THE GOVERNOR

JIM GERINGER
GOVERNOR

STATE CAPITOL BUILDING
CHEYENNE, WY 82002

July 22, 1997

Mr. Vincent Vukelich
Committee Management Secretariat
General Services Administration
Room 2558-MC
1800 F Street, N.W.
Washington, D.C. 20405

Re: Federal Register Notice for Proposed Rulemaking Relative to the Federal Advisory Committee Act

Dear Mr. Vukelich:

On behalf to the State of Wyoming, please be advised that we have reviewed the referenced notice. In accordance with our own comment period given to all affected state agencies, I have attached comments from the Department of Agriculture and the Game and Fish Department for your review. I trust that you will give them due consideration.

We realize that this is an Advanced Notice of Proposed rulemaking. I anticipate that the State will offer a fuller analysis and a more detailed response on the proposed rule once it is prepared later this year.

Thank you for the opportunity to comment.

Sincerely,

(b) (6)

Paul R. Kruse
Assistant Director
Office of Federal Land Policy

PK:jh
Enclosures

7/28/97

INTERNET GOVERNOR@MISSC.STATE.WY.US • TELEPHONE (307) 777-7434 • FAX (307) 632-3909

Wyoming
Department of Agriculture

JIM GERINGER, GOVERNOR
RON MICHELI, DIRECTOR

2219 Carey Ave., Cheyenne, WY 82002 ■ Phone: (307) 777-7321 ■ FAX: (307) 777-6593
E-mail: wda@missc.state.wy.us ■ Home page address: wyagric.state.wy.us

July 10, 1997

Wyoming State Clearinghouse
Office of Federal Land Policy
Attn: Julie Hamilton
Herschler Building, 3W
Cheyenne, WY 82002

RE: Advanced Notice of Proposed Rulemaking for the Federal Advisory Committee Act

Dear Julie:

We have reviewed the June 10, 1997 Federal Register Notice on the proposed rulemaking for FACA and are making the following comments on this proposed rulemaking.

It is essential that officials of federal agencies be allowed to participate in collaborative decision-making processes, such as the Coordinated Resource Management (CRM) process. The success of these processes depends upon all affected interests being actively involved in the process. Yet, the current FACA language and its interpretations are not clear as to whether federal agencies can participate in CRM-type processes. The Unfunded Mandates Act of 1995, Section 204, is a step in the right direction, but it does not clearly exempt CRM-type processes from FACA. In fact, many federal officials believe FACA prohibits their participation in these processes, or they hide behind FACA to avoid such participation.

Federal agency participation in collaborative decision-making processes need to be encouraged by FACA. Federal officials need to be actively involved in consensus decision-making, field trips, fact-finding, and problem-solving. They need to be able to participate in these processes where win-win solutions are reached through consensus. These processes are powerful conflict-resolution and conflict-prevention mechanisms that permit groups of diverse interests to identify goals and implement agreed-upon action plans. FACA should not destroy this democratic process.

As open spaces and natural resources become increasingly threatened, collaborative decision-making processes become increasingly essential. There's something wrong when FACA prohibits federal officials from participating in a democratic process of affected interests working together to resolve problems. FACA needs to be changed to encourage federal decision-makers to be involved in these collaborative decision-making processes.

Sincerely,

(b) (6)

Ron Micheli,
Director of Agriculture

7/28/97

WYOMING
GAME AND FISH DEPARTMENT
Jim Geringer, *Governor* John Baughman, *Director*

July 7, 1997

WER 8690
U.S. General Services Administration
Office of Governmentwide Policy
Federal Register Notice
Proposed Rulemaking
Federal Advisory Committee Act (FACA)
SIN: 97-117

WYOMING STATE CLEARINGHOUSE
OFFICE OF FEDERAL LAND POLICY
ATTN: JULIE HAMILTON
HERSCHLER BUILDING, 3W
CHEYENNE, WY 82002

Dear Ms. Hamilton:

The staff of the Wyoming Game and Fish Department has reviewed the Federal Register Notice for proposed rulemaking relative to the Federal Advisory Committee Act. We fully concur that provisions within the Act need to be revised or clarified to eliminate confusion regarding what constitutes an advisory committee. Our perception is that the Act greatly hinders our ability to work with federal agencies. We concur with the scope of the proposed rulemaking and will provide comments when specific rules are proposed.

Thank you for the opportunity to comment.

Sincerely,

(b) (6)

BILL WICHERS
DEPUTY DIRECTOR

BW:TC:as
cc: USFWS

7/28/97

Headquarters: 5400 Bishop Boulevard, Cheyenne, WY 82006-0001
FAX (307) 777-4610

STATE LANDS AND
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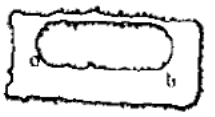

STATE OF WYOMING
OFFICE OF THE GOVERNOR

JIM GERINGER
GOVERNOR

STATE CAPITOL BUILDING
CHEYENNE, WY 82002

July 23, 1997

Mr. Vincent Vukelich
Committee Management Secretariat
General Services Administration
Room 2558-MC
1800 F Street, N.W.
Washington, D.C. 20405

Dear Mr. Vukelich:

As a follow-up to our recent telephone conversation, I am sending you an overview of the Clearinghouse function of the Office of Federal Land Policy. This overview was sent to all federal agencies encouraging them to utilize our process to insure that all affected State agencies receive relevant documents.

The Clearinghouse solicits, coordinates and transmits State agency input on Federal environmental and planning documents affecting natural resource use in Wyoming. The Office directs the development of a single state position endorsed by the Governor on significant policy issues addressed in these documents while preserving the opportunity for each state agency to provide valuable input based on their professional expertise and resource responsibilities.

Once a document is received by the Clearinghouse, it is logged and distributed to affected state agencies for their review and comment. Many times these agencies must then distribute to their field personnel for review and comment. All agency comments are then routed to the Clearinghouse, analyzed and transmitted, together with policy comments where appropriate. This process requires a minimum of thirty (30) days from the date of receipt.

Your cooperation in providing documents to the Clearinghouse as quickly as they are available is essential to this process. A minimum of fifteen (15) copies is needed. Small documents can be copied by this Office. The processing of major bound documents is delayed when we are not furnished with adequate copies in the initial mailing. When individual state agencies are on your mailing list, it will avoid duplication if you provide us with a list of those who have received a direct mailing.

RECEIVED 7/28/97

INTERNET GOVERNOR@MISSC.STATE.WY.US • TELEPHONE (307) 777-7434 • FAX (307) 632-3909

All documents should be sent to:

Office of Federal Land Policy
Herschler Building, 3 West
122 West 25th Street
Cheyenne, Wyoming 82002-0600

We believe that this process promotes a strengthened working relationship between Federal resource managers and the State of Wyoming. Should you have any questions please call me at (307) 777-3697.

Sincerely,

(b) (6)

Paul R. Kruse
Assistant Director
Office of Federal Land Policy

PK:jh

United States Department of the Interior

FISH AND WILDLIFE SERVICE
1875 Century Boulevard
Atlanta, Georgia 30345

IN REPLY REFER TO:

July 10, 1997

Mr. Vincent Vukelich
Committee Management Secretariat
General Services Administration
Office of Governmentwide Policy
Room 5228-MC
1800 F Street, NW.
Washington, DC 20405

Dear Mr. Vukelich:

This is in response to the General Services Administration's request for comments regarding a proposed revision of the implementing regulations for the Federal Advisory Committee Act (FACA), published in the *Federal Register* on June 10, 1997 (62 FR 31550). Our comments relate specifically to the Fish and Wildlife Service's administration and implementation of the Endangered Species Act of 1973, as amended (Act).

Our general perceptions of the current statute and its implementing regulations are that the provisions are too general, not well explained, broadly interpreted, and have overly burdensome compliance requirements. These conditions apparently make it easy to unintentionally violate the statute, resulting in significant delays and impacts to the decision making process. They also foster "creative alternatives" to the compliance provisions, which take time and still risk successful legal challenge. We support a revision of the implementing regulations that has the overall effect of restricting broad interpretations of provisions through clear and precise defining of terms and concepts.

The spirit of Secretary of the Interior Bruce Babbitt's 10-Point Plan and other efforts to make the Act work better involves opening up the process to ensure the best scientific information is used in decision making and to get stakeholders more involved in the process. The uncertainty of which public involvement strategy or situation may be construed as a violation of the formal requirements regarding advisory committees under FACA has caused our offices to be very cautious in getting input from the public to the detriment of mutually beneficial solutions. The following are specific examples:

> In an effort to pull together the best available scientific information relating to whether or not the Alabama sturgeon warranted listing, experts on the subject were invited to address several questions concerning the sturgeon's status. Opponents to listing the sturgeon

successfully challenged the Service's means of acquiring the information as a violation of FACA; thus, we were precluded from using the findings of the experts in the decision to list or not list.

Botanists throughout the Southeastern United States met periodically to discuss the status of plants and their relative priority in terms of the need for protection under the Act. This was an excellent, cost effective means of assessing the best available information as the basis for future listing actions. Those meetings are no longer held for fear of violating FACA.

We would like to use the forum of the multi-interest partnerships, such as the Mobile River Basin Aquatic Ecosystem Coalition, as an effective means to conduct prelisting coordination, recovery planning, and habitat conservation planning on an ecosystem basis, but we are hesitant to do so because of our uncertainty over what constitutes a FACA violation.

Revised regulations are urgently needed to provide the clarity needed to overcome these obstacles to improve stakeholder involvement in Federal planning and decision making.

We appreciate the opportunity to provide comments and would like to be included in the mailing list for materials that provide FACA guidance to Federal agencies. If you have any questions regarding our comments, please feel free to contact Ms. Gloria Bell at 404/679-7100.

Sincerely yours,

(b) (6)

Marvin E. Moriarty
Acting Regional Director

THE FEDERAL ADVISORY COMMITTEE ACT, RULES AND EXECUTIVE ORDERS: JUDICIAL INTERPRETATIONS AND SUGGESTED REVISIONS

Elizabeth Ann Rieke
May 1997

Natural Resources Law Center
University of Colorado School of Law
Boulder, Colorado 80309-0401

THE FEDERAL ADVISORY COMMITTEE ACT, RULES AND EXECUTIVE ORDERS: JUDICIAL INTERPRETATIONS AND SUGGESTED REVISIONS

INTRODUCTION

The Federal Advisory Committee Act (FACA)[1] was enacted in 1972 both to minimize the number of committees advisory to federal executive branch officers and agencies and to open up the activities of the advisory committees. (FACA, § 2). FACA imposes requirements for the establishment and termination of advisory committees and a set of open government procedures for the conduct of all such committees.

Despite its purposes, FACA is perceived by many community-based, collaborative groups and some federal agencies as an obstacle to 1) efforts by the groups to meet regularly with agency representatives and to have a voice in agency decisions and 2) efforts by federal agencies to seek advice from groups outside the agency. The Natural Resources Law Center is examining the possibility of modifying FACA or the FACA rules with the twin goals of making the law more workable and maintaining its core protections.

REQUIREMENTS OF THE FEDERAL ADVISORY COMMITTEE ACT

FACA applies to advisory committees established by federal statute or reorganization plan, established or utilized by the President, or established or utilized by one or more federal agencies. In this article, only advisory committees established or utilized by federal agencies will be discussed. It is important to note that FACA applies to advisory committees whether they are "established by" a federal agency *or* established by someone else but "utilized by" the federal agency to obtain advice or recommendations. There are various statutory exemptions, including one for meetings held exclusively between federal officials and elected state, local and tribal officers or their designated employees. (2 U.S.C.A. § 1534(b) (West Supp. 1996)).

To comply with FACA an advisory committee must:

- "[B]e fairly balanced in its membership in terms of the points of view represented and the functions to be performed...." (FACA, § 5(b)(2), (c)).

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[1] FACA is found in 5 U.S.C.A. Appendix 2 (1996).

- Have a charter specifying the advisory committee's official designation, objectives, scope, duties, costs, estimated number and frequency of meetings and termination date. (FACA, § 9(c)).
- Have a designated federal officer or employee who is authorized to adjourn a meeting and required to approve the call of and agenda for each meeting and to attend each meeting. (FACA, § 10(e), (f)).
- Publish notice of meetings in the Federal Register. (FACA, § 10(a)(2)).
- Hold open meetings. (FACA, § 10(a)(1)).
- Permit interested persons to attend, appear before or file statements with the committee. (FACA, § 10(a)(3)).
- Make committee records available for public inspection and copying. (FACA, § 10(b)).
- Keep detailed minutes of each meeting. (FACA, § 10(c)).

This comprehensive set of requirements applies to advisory committees "established by" or "utilized by" a federal agency. In addition, an advisory committee that falls in the "established by" category may be established by the agency head only after consultation with the head of the General Services Administration and determination by notice published in the Federal Register that the committee is in the public interest in connection with the lawful duties of the agency. (FACA, § 9(b)). Executive Order No. 12838, issued February 10, 1993, provides that new advisory committees shall not be created unless the agency head "finds that compelling circumstances necessitate creation of ...a committee" and approval is received from the Director of the Office of Management and Budget. The order further provides that "[s]uch approval shall be granted only sparingly and only if compelled by considerations of national security, health or safety, or similar national interests." (Executive Order 12838, 58 Fed Reg. 8207 (1993), *reprinted in* 5 U.S.C.A. app. 2 § 14 (1996)).

ADVISORY COMMITTEES "UTILIZED BY" FEDERAL AGENCIES: UNINTENDED CONSEQUENCES?

The application of FACA to advisory committees "utilized by" a federal agency is extremely problematic. FACA has been interpreted to apply to watershed and forestry community-based, collaborative groups. In other words, in some cases such groups have been considered to be advisory groups "utilized by" a federal agency.

The classification of community-based, collaborative groups as groups "utilized by" a federal agency and therefore subject to FACA requirements stems from the definition of "utilized" in the FACA rules. The definition in the rules is necessary because the statute neither defines "utilized" nor sheds any other light on the meaning of the term. Under the FACA rules, a committee is "utilized" if it is a "committee or other group composed in whole or in part of other than full-time officers or employees of the Federal Government with an established existence outside the agency seeking its advice which the ... agency official(s) adopts, such as through institutional

arrangements, as a *preferred source* from which to obtain advice or recommendations on a specific issue or policy within the scope of his or her responsibilities in the same manner as that individual would obtain advice or recommendations from an established advisory committee." (41 C.F.R. § 101-6.1003 (1996)(emphasis added)).

It is important to note that the definition centers on the amount of influence a group must have over a federal agency to make it subject to FACA under the "utilized by" category. As construed in the definition, FACA's intent is to assure that no outside group becomes a preferred source of advice for a federal agency unless the group is in effect federalized by complying with FACA and therefore having a charter filed with the agency head, a designated federal official, notices of the meetings filed in the federal register, and so forth. That interpretation creates a major dilemma for community-based collaborative groups. As independent groups, they have no interest in complying with all of FACA's procedural requirements. They want to maintain their independence and flexibility. On the other hand, community-based groups often seek a close relationship with the federal agencies they are trying to influence. Such groups generally have a broad membership representing various interest groups in the community and typically operate on a consensus basis. Naturally, such groups seek to gather the views of their members, forge a consensus where possible and strongly influence a federal agency's decision on a given matter. Such groups may want federal representatives to participate in their meetings either as full-fledged members or in an advisory capacity. In effect, the community-based, collaborative group may seek to become a preferred source of advice on a given set of issues.

The definition's emphasis on the amount of influence a group may have over a federal agency before becoming subject to FACA is reflected in federal agency guidance on complying with FACA. For example, Forest Service guidance urges employees to assure there is sufficient separation between the Forest Service and outside groups seeking to influence the Forest Service. That guidance repeats the stricture not to "let any group become a preferred source for advice." (Memo from Jack Ward Thomas, Chief, Forest Service, to All Employees, October 2, 1995).

For fear of violating FACA, some federal personnel have been reticent to participate in community-based, collaborative groups. They are concerned that participation in such a group may make an agency decision subject to a legal challenge under FACA. Thus, FACA is generally seen by those groups as a substantial obstacle to their attempts to collaborate with federal officials. Some community representatives go so far as to suggest that FACA has become an excuse for federal agencies to refrain from participating in community-based groups. Many federal officials share the view that FACA is an obstacle to collaborative efforts. Some are simply ignoring FACA guidance and continuing to participate in community-based, collaborative groups. In general, FACA has created an atmosphere of uncertainty about collaboration among federal officials and community-based groups.

There is a pathway out of the dilemma created by the FACA rules and agency guidance. For unknown reasons, many discussions of FACA, the FACA rules and agency guidance fail to give full recognition to a series of court decisions addressing the meaning of "utilized." Since the

seminal opinion is a Supreme Court decision, it supersedes any other interpretations of "utilized," including the definition in the FACA rules. In the Supreme Court decision, *Public Citizen v. United States Department of Justice*, (491 U.S. 440, 109 S.Ct. 2558 (1989)), issued after the adoption of the FACA rules, the Supreme Court expressly rejected a literal reading of the term "utilized" because "[a] literalistic reading...would catch far more groups and consulting arrangements than Congress could conceivably have intended." (491 U.S. at 464, 109 S.Ct. at 2572). After reviewing the legislative history of FACA, the Court concluded that Congress intended to encompass within the phrase "utilized by" only groups "organized by, or closely tied to, the Federal Government, and thus enjoying quasi-public status." (491 U.S. at 461, 109 S.Ct. at 2570). The National Academy of Sciences is cited as an example of the type of group intended to be covered by "utilized by." (491 U.S. at 462, 109 S.Ct. at 2571).

Three decisions of the Court of Appeals for the District of Columbia interpreting *Public Citizen* provide further guidance. In *Washington Legal Foundation v. United States Sentencing Commission*, (17 F.3d 1446 (D.C. Cir. 1994)}, the court explained that "utilized" is "a stringent standard, denoting something along the lines of actual management or control of the advisory committee." (17 F.3d at 1450). And the court expressly noted that "influence [by an agency over an advisory group] is not control." (17 F.3d at 1451). Thus, in determining whether a group is subject to FACA, this decision looks not to the amount of influence the group has over the agency but rather to the "quantum of control an agency ...[has] over an advisory committee...." (17 F.3d at 1450). Before it can be said that an agency utilizes a group as an advisory group, that quantum of control must make the group "so 'closely tied' to an agency as to be 'amenable to strict management by agency officials'." (Food Chemical News v. Young, 900 F.2d 328, 333 (quoting *Public Citizen*, 491 U.S. at 457, 458, 461 109 S.Ct. at 2568, 2570)). In the most recent of the three D.C. Court of Appeals decisions, *Animal Legal Defense Fund v. Shalala*, 104 F.3d 424 (1997), the court explained that its two preceding opinions "extended slightly ...the meaning of a 'utilized advisory committee'" provided by the Supreme Court in *Public Citizen*. The Supreme Court's opinion could be construed to hold that an advisory committee must have a quasi-public character in order to fall within the ambit of a "utilized by" committee. The D.C. Circuit cases recognize that if "a government agency actually took over the management of [a purely private committee], it would be brought under FACA." (104 F.3d at 430). Thus, those cases establish a second test, a strict management or control test, for whether an advisory committee utilized by a federal agency is subject to FACA.

Public Citizen and its progeny indicate the courts will determine that advice from an independently established group triggers FACA only if a federal agency exercises extensive control over the group. In determining whether the quantum of control an agency has over a group is sufficient to implicate FACA, courts will look to "such factors as whether: (i) the agency appoints members to the group; (ii) the group receives agency funding; (iii) the agency sets the group's agenda; and (iv) the group answers directly to the agency." (Steven P. Croley, Practical Guidance on the Applicability of the Federal Advisory Committee Act, 10 Admin. L.J. 111, 156 (1996)). Just which combinations of the listed elements will provide sufficient indicia of control to trigger FACA remains to be litigated. However, it is clear from *Washington Legal Foundation*

v. United States Sentencing Commission that agency membership on an advisory group, leading to "significant influence on ...[the] deliberations and on the ensuing recommendations" is not sufficient control to bring FACA into play. (17 F.3d 1447, 1451). In that case, the advisory group at issue included two members of a federal agency, but that federal membership was deemed insufficient to trigger FACA.

The narrow definition of "utilized" provided by the courts clearly excludes most, if not all, collaborative, community-based groups from the "utilized by" category. Such groups are under the management and control of their own boards, not under the management and control of a federal agency, even if the agency is a full participant in the group. What if the group also receives part of its funding from one or more agencies? The courts have not yet dealt with that exact set of facts but since *Public Citizen* they seem predisposed to find that the "utilized by" branch of FACA does not apply to independent groups. Only if the funding guarantees a significant quantum of control over the group would the courts be likely to find that FACA applies.

The court decisions open various avenues for trying to clarify for agencies, and those seeking to influence them, the narrow scope of the "utilized by" category. One approach would be to seek to insert into the FACA statute a definition of "utilized" that is based on the court decisions. Another would be to approach the General Services Administration, the agency responsible for administration of FACA, with the suggestion that the definition of "utilized" in the FACA rules be modified to comport with the court decisions. Interested groups could also work with agency personnel to explain the narrow scope of the "utilized by" category of advisory groups.

The conclusion that community-based, collaborative groups are not subject to FACA will be unsettling to some groups. National interest groups who do not have the resources to participate in all such groups may be among those who dispute the conclusion. Some national environmental groups have expressed concern that community-based, collaborative groups reach lowest common denominator decisions and provide an avenue for industry to evade federal environmental laws. Thus, some national interest groups have a strong interest in seeing that meetings of community-based, collaborative groups that involve federal officials at a minimum, are properly noticed, are open to the public, include a period for public comment and are regularly reported in minutes. In order to address this concern, it may be appropriate to require federal agencies, before agreeing to participate in community-based, collaborative groups, to ascertain that such requirements are met.

ADVISORY COMMITTEES "ESTABLISHED BY" FEDERAL AGENCIES: BETWEEN A ROCK AND A HARD PLACE

The application of FACA to advisory committees "established by" a federal agency is also problematic. FACA, Executive Order No. 12838 and agency guidance from the Clinton Administration put federal executive agencies between a rock and a hard place. On the one hand,

the Clinton Administration has mandated enhanced collaboration with stakeholders. On the other, FACA and Executive Order No. 12838 establish cumbersome procedures and strict standards for the establishment of advisory committees. They centralize the decision whether to establish an advisory committee in the agency head and the head of OMB. Executive Order No. 12838, requiring compelling considerations of national security, health or safety, or similar national interests before a new advisory committee may be created, sets the bar extraordinarily high for the establishment of new committees.

Given the conflicting and cumbersome mandates of FACA, Executive Order No. 12838 and the guidance from the Clinton Administration, it should come as no surprise that many agency advisory committees are established without complying with FACA and Executive Order No. 12838. National, regional and local offices simply establish the committees, utilize their advice in decision making and disband them when the decision making process is complete. No charter, no OMB approval, no federal register notices, no designated federal officers. And they may or may not comply with the long list of additional procedural requirements.

In an era when we recognize that centralized decision making tends to increase the length of time a decision takes without necessarily enhancing the wisdom of the decision, it seems appropriate to modify both FACA and Executive Order No. 12838 to foster decentralization of the decision whether to establish an advisory committee to the appropriate level of government. Agency heads should be able to establish national advisory committees without approval of the head of GSA or the head of OMB. Agency regional directors should be able to establish regional and local advisory committees. Notice of establishment of the committees should be in the Federal Register with a provision for getting on a mailing list for notices of meetings. Individual meeting notices should not be required to be published in the Federal Register. Rather, they should be sent to a list of potentially interested parties established by the agency and to all parties requesting notices of the meetings. This notice mechanism, rather than reliance on the Federal Register, should increase the likelihood that affected parties will actually receive timely notice of advisory committee meetings.

The extraordinarily high standard in Executive Order No. 12838 for establishment of advisory committees should be removed. The FACA standard, requiring advisory committees to be in the public interest in connection with lawful duties of the agency, appropriately leaves to agency personnel the decision whether an advisory committee is needed.

This set of modifications would make it easier for agencies to comply with FACA and, therefore, enhance the likelihood of compliance. However, the modifications retain the core protections for open decision making established by FACA.

SUMMARY

With respect to community-based, collaborative groups, this article concludes that they are generally not subject to FACA. Only if such a group were so closely tied to a federal agency as to be subject to strict management or control by the agency would it fall within the "utilized by" category of advisory groups and, therefore, be required to comply with FACA's procedural strictures. With respect to advisory groups established by federal agencies, this article recommends that the authority to establish the groups be decentralized. Additionally, the article recommends that the extraordinarily high standard for establishing advisory groups set forth in Executive Order No. 12838 ("only if compelled by considerations of national security, health or safety, or similar national interests") be removed. Decentralization and removal of the high standard would return to the appropriate level of government flexibility to establish advisory groups when they are needed to carry out the duties of the agency.

From: VINCENT DEWITTE
To: JOHN
Date: 5/23/97 8:42am
Subject: FACA -Reply

Guidance would be helpful for:

1. explain the scope of the local civic group exception
2. what really is an "operational committee?"
3. how should FACA committee treat privileged or confidential info?
4. part-time employment
5. what is fair balance in scientific context?

ask Vince to consider including some examples1 with the guidance to give the rule some context.

>>> WENDY JOHN 05/22/97 11:22am >>>
In connection w/ Vince V's detail to GSA, he will be working on a revision to the FACA regs. AS part of its way to see where guidance is most needed, GSA is looking for the "10 most requently asked questions." Please think about FACA issues that keep coming up, and send them to me. I'll consolidate them for Vince's use. Thx.

Author: "lynn larsen" <llarsen@bangate.fda.gov> at internet
Date: 7/19/97 12:31 PM
Priority: Normal
TO: vincent vukelich at GSA-MC
CC: njp@cdrh.fda.gov at internet
Subject: Advisory committee ANPRM and proposed rules

Mr. Vukelich -

Thank you for your FAX of the ANPRM.

We have an FDA advisory committee task group that, among other things, has been reviewing our agency's regulations on advisory committees. This is a part of the FDA "reinvention" effort. Our group is chaired by Ms. Nancy Pluhowski of the Center for Devices and Radiological Health. Our FDA Committee Management Officer, Ms. Donna Combs, is also a member.

We would appreciate being placed on the mailing list for your proposed rule. My address is provided below. Ms. Pluhowski's address is HFZ-400, FDA/CDRH, room 1100, 9200 Corporate Boulevard, Rockville, MD 20850; Ms. Combs address is HFA-306, FDA, 5600 Fishers Lane, Rockville, MD 20857-001.

We had pretty thoroughly developed our thoughts and proposals for changing our current regulations with respect to committee members (nomination, selection and appointment). However, that has now become merely the beginning of a more comprehensive review.

Other individual and group obligations, perhaps fortunately, have kept us from progressing as expeditiously on the larger effort as anticipated. I think it will be useful for us to provide you with some informal comments on the ANPRM issues that bear on our own reform effort. We, of course, would want to be sure that our comprehensive revisions are consistent with those of GSA.

I know that your ANPRM comment period closed on July 10 and that you will want to publish your proposal as soon as possible. I will try to provide you with our group's comments by the end of July. I could perhaps provide my own comments, but I think it would be better if we had the input from across FDA.

Lynn Larsen, Ph.D.
HFS-005, 200 C St. SW, Washington, DC 20204
202-205-4727/FAX 202-401-2893
Banyan: Lynn Larsen@OPPSI@FDA.CFSAN
Internet: LLarsen@Bangate.FDA.Gov

DEPARTMENT OF HEALTH & HUMAN SERVICES

Office of the Secretary

Washington, D.C. 20201

JUL 17 1997

Note to Vince Vukelich:

Attached are comments that I received from the Substance Abuse and Mental Health Services Administration (SAMHSA) on the Advance Notice of Proposed Rulemaking. I hope to have additional comments to you by early next week.

Thanks for giving us the extra time for submitting our comments.

(b) (6)

Ellen Washington
DHHS/CMO

Attachment

COMMENTS FROM SAMHSA ON
GSA PROPOSED REVISION TO REGS IMPLEMENTING FACA -
ISSUES LIKELY TO BE ADDRESSED (Per June 10, 1997 FR Notice):

A. SCOPE AND APPLICABILITY

1. Review Applicability of Act to Pre-Existing Groups.

SAMHSA is not sure of the meaning of this. We interpret it to mean groups other than Federal advisory committees. In other words, if a group of citizens formed an advocacy organization representing States receiving SAMHSA block grant funds and they requested a meeting with SAMHSA, this should not be subject to FACA. However, if SAMHSA requested the meeting, we'd have to review the purpose of the meeting and the FACA questions to see if FACA applied.

If it means pre-existing Federal advisory groups that should be covered by FACA, then the regs need to prescribe how to proceed to bring it in line with FACA. (This could potentially open a door, so that folks could 'expedite' the process of establishing a committee and then clean up after themselves by doing the paperwork).

2. Revise Definition of "Utilize" Which Currently Appears in the Regulations at 41 CFR 101-6.1003.

"Utilized (or used), as referenced in the definition of advisory committee in this section, means a committee or other group composed in whole or in part of other than full-time officers or employees of the Federal Government with an established existence outside the agency seeking its advice which the President or agency official(s) adopts, such as through institutional arrangements, as a preferred source from which to obtain advice or recommendations on a specific issue or policy within the scope of his or her responsibilities in the same manner as that individual would obtain advice or recommendations from an established advisory committee."

SAMHSA has not had experience with this type of situation yet, but agrees that it needs clarification due to the potential for this happening and the numerous case law issues related to this definition.

3. Provide Additional Guidance on Committees Which Perform Primarily Operational as Opposed to Advisory Functions as Currently Defined at 41 CFR 101-6.1004(g).

"Any committee which is established to perform primarily operational as opposed to advisory functions. Operational functions are those specifically provided by law, such as making or implementing Government decisions or policy. An operational committee may be covered by the Act if it becomes primarily advisory in nature."

SAMHSA agrees that this definition needs clarification. For example, SAMHSA has two chartered initial review groups known as Special Emphasis Panels (SEPs). Some individuals believe that these groups perform the operational task of "prioritizing grant and contract applications/proposals on the basis of technical characteristics" measured by outside experts. In other words, they rank proposals so Federal staff are better able to apply the award criteria, enter negotiations and make funding decisions. This activity is mandated by SAMHSA's enabling legislation (Section 504 of the PHS Act; 42 USC 290aa-3).

The management of SEPs under FACA is time- and money-intensive. Each SEP panel is created for a particular review (based on technical expertise required for a given application or proposal); there are no standing members. All SEP meetings are closed to the public, in accordance with the Government in the Sunshine Act, so there is no clear benefit to the public to publicize these meetings in the Federal Register. It is almost procedurally impossible to comply with the FACA requirement to publish at least 15 days prior to the meetings, due to the nature of the grant and contract review cycles, especially when it comes to reviews for disaster assistance grants under FEMA. In addition, exhaustive records have to be maintained for such groups in order to be able to comply with the advisory committee reporting requirements.

Removing these committees from FACA coverage would reduce the number of Federal advisory committees, thereby providing room in the committee ceilings for those committees that were needed. To propose this action would not appear to be contrary to the original legislative intent in the creation of FACA (to prevent "domination of committees by representatives of industry, who are thereby afforded a special opportunity to influence federal policy on matters in which they have vested economic interest but which are also of vital concern to the public.")[1] Furthermore, in some of the case law, it would appear that some decisions would be the basis for such an action. In Sofamor Danek, related to a panel 'utilized' by the Agency for Health Care Policy & Research (AHCPR), the district court concluded, among other things, that its dismissal of the case was justified also by prior case law in which the FACA was held not to apply to advice "regarding a discrete and narrow scientific question rather than a public policy issue." SEPs offer a discrete and narrow scientific/technical review of specific grant and contract applications and proposals.

In addition, a key part of the argument in Nader v. Baroody is that there was "little or no continuity in the membership." This is absolutely true for the SEPs - each panel is created uniquely for the technical expertise required for each grant or contract requirements. Furthermore, individuals on the SEPs score each application/proposal independently, from which a total score is derived, using a formula. Therefore, it can be argued that these committees are 'operational' in nature - and thus beyond FACA's scope.

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[1]Public Citizen Litigation Group, October 1989.

Removing SEPs from FACA coverage also makes sense from a reinvention perspective. It would eliminate extensive record-keeping and use of limited fiscal resources, for activities which offer little or no benefit to the public.

At the very least, if not determined to be operational, perhaps a separate category of committees can be established, under FACA, for initial review groups. SAMHSA firmly believes in the principles expressed within FACA, but under the current system, we see no benefit to the public from trying to follow the same procedures as our other committees.

4. Explain Exclusions from the Act's Coverage, Including New Provisions Based on Section 204(b) of the Unfunded Mandated Act, Public Law 104-4, Relating to State, Local and Tribal Government Representatives.

It is vital to SAMHSA to work with State, local, and tribal governments. As we move ahead with the Government Performance and Results Act (GPRA) and other recent initiatives working with States as partners, we need the regs to clarify (as broadly as possible) what types of communications are exempt from FACA. Government agencies that work with State, local and tribal governments need mechanisms to encourage dialogue rather than erect barriers to it. We endorse the components of the Unfunded Mandates Act, which allow for some streamlining of FACA requirements - such as a charter not counting against the committee ceiling. However, as we understand it, much of FACA still applies. There is still much to be done to allow for streamlining, recognizing these are usually temporary activities related to a specific question or task:

- is a charter even necessary or could a Memorandum of Understanding be drafted and a copy provided GSA?
- can the agency head appoint members without a lengthy process?
- can appointed 'members' be offices or organizations so that individual delegatees would participate at a given meeting?
- how does 'balance' apply to a committee of such individuals (since they have similar backgrounds)?
- does it serve the public to keep the same kinds of records as with FACA committees and prepare the same level of reports?

One of the questions agencies face is when is FACA triggered? For example, we might meet with only State and local government representatives on a particular issue and not invoke FACA; however, if we add 1 or 2 representatives from an organization of similar people (e.g., National Association of State Alcohol and Drug Abuse Directors) who are not also State representatives, then FACA applies?

One could make the case that such committees are 'operational' (using arguments similar to those used for exempting peer review groups from FACA) and therefore exempt from FACA?

B. STATUS OF INDIVIDUALS

1. Provide Definition of "Full Time Federal Employee" under the Act.

When FACA was written, there was little or no opportunity to have other than full time employment. Now, there are various workplace initiatives and opportunities for flexibility of an individual's work schedule. Currently, the way this is written in FACA, a part-time permanent employee cannot serve as the DFO. We recommend that the language read: "permanent Federal employee." However, we recognize that the regs cannot change the law but merely interpret it, so this may not be possible.

2. Clarify Status of Consultants to Advisory Committees.

Consultants should be clarified as they relate to committees. Consultants are primarily used for their particular expertise to bring knowledge to the committee to assist them in their deliberations. A consultant is an individual officially invited by the agency to participate in an official capacity - to speak to the Council or otherwise provide technical expertise on a matter. Other 'experts' may attend public meetings, but they have no formal role other than members of the public, because they attend of their own volition. They may speak during the public comment period, and a committee member may even ask them to answer a particular question, but these individuals are not paid an honorarium or reimbursed for travel, as official consultants are.

Consultants (whether appointed as SGEs or brought in under Professional Services Contracts) are not 'appointed' members and therefore cannot act as a member (e.g., sit at the table, participate in deliberations, or vote) except in some cases where they have been appointed by the agency as a temporary voting member for a given issue at a particular meeting.

C. CONSENSUS

1. Update and Expand References to "Consensus' Advice as a Factor in Determining the Act's Coverage to Specific Groups of Meetings.

Clarify how an agency can protect itself from FACA trouble when using advice from individuals (e.g., where the courts have found an agency utilized it as consensus advice). Clarify the difference between a group of individuals, acting as individuals, reaching consensus vs. when the agency solicits a consensus opinion. Distinguish also the difference between consensus and unanimous opinion.

D. ESTABLISHMENT AND OPERATION OF FEDERAL ADVISORY COMMITTEES

1. Revise Procedures for Establishment, Re-establishment, or Renewal of Advisory Committees.

Procedures for establishing committees should be streamlined (maybe on an-line fill in the blank charter?), especially as it relates to committees formed to meet an immediate problem (e.g., committees formed under Reg-Neg and Unfunded Mandates).

Why is it necessary to renew/recharter (full set of documents) every two years? Why can't a simple memorandum be developed from the agency head to GSA, saying the accomplishments of the committee have been reviewed (based on the GSA Report), and it is the agency's decision to retain the committee for another two years? This is particularly true for statutorily mandated committees.

2. Review Elements of "Balance" for Committee Membership.

Clarify 'balance.' FACA says, "require the membership of the advisory committee to be fairly balanced in terms of the points of view represented and the functions to be performed by the advisory committee" (PL 92-463 Section 5(b)(2)). Additionally, the PHS Act mandates SAMHSA's Councils to have 12 members - 9 professional members and 3 public members (from a variety of professions). This is an attempt to ensure some measure of balance.

In addition, the Department of Health and Human Services and SAMHSA have both tried to comply with the balance requirements by ensuring representation of both genders, breadth of racial/ethnic minority groups, geographic location, type of employment (e.g., states, universities, community organizations), etc.

However, it must be recognized that balance on a given committee depends somewhat on the issue before the committee. Some leeway must be left to the agency to determine if the committee is balanced; the regs should merely describe how agencies should go about balancing a committee's membership. For example, many committees would benefit from having a consumer serve as a regular member; others might want an individual consumer appointed as a temporary voting member for a particular meeting/issue only; it might be inappropriate for other committees to include a consumer as a member.

3. Expand discussion for closing an advisory committee meeting under the Government in the Sunshine Act and other relevant statutes.

SAMHSA believes it does not contribute to the public interest to publish Federal Register notices for each and every grant and contract review committee meeting. These meetings

are entirely closed to the public, and in the case of contract proposals, even the title of the RFP being reviewed is not made public (to protect the integrity of the procurement process). We propose that such meeting notices be able to be published annually as a blanket notice each year in January. Specific meeting dates and times can be readily determined by interested citizens and groups by contacting the individual listed as Contact in the Federal Register notice.

Furthermore, there are financial costs involved in publishing these notices. In our opinion, these costs are not offset by the theoretical benefit to the public of publishing each and every notice of peer review meetings individually. If necessary, a retrospective list of the previous year's meetings of peer review committee meetings could be published in order to provide public notification of an agency's activity.

GSA-REGS.REV
7/2/97

FAXED To You 7/9/97

DEPARTMENT OF HEALTH & HUMAN SERVICES

Public Health Service

Substance Abuse and Mental
Health Services Administration
Rockville MD 20857

DATE: July 7, 1997

TO: Committee Management Secretariat
General Services Administration

THROUGH: Acting Associate Administrator
Office of Policy and Program Coordination (b) (6)

FROM: Acting Director, Extramural Programs

SUBJECT: FACA Regulation Revision: Advance Notice of Proposed Rulemaking

Thank you for the opportunity to comment on the Proposed Rulemaking, published in the Federal Register on June 10, 1997.

We requested comments from SAMHSA's Center Directors and Administrator (as Council Chairs), our Executive Officer, and Director, Office of Extramural Activities Review. Comments were also requested from our Deputy Administrator, Legislative Officer, Center policy staffs, Acting Associate Administrator for Office of Women's Services, Director, Division of Workplace Programs, Office of General Counsel, and Council/Committee Executive Secretaries and Committee Management staffs.

SAMHSA's comments have been compiled into the attached document. If you have any questions, please contact Jeri Lipov, Committee Management Officer, at (301)-443-4266.

(b) (6)

Joel W. Goldstein, Ph.D.

Attachment

cc: HHS Committee Management Officer

DECLASSIFIED 7/10/97

COMMENTS FROM SAMHSA ON
GSA PROPOSED REVISION TO REGS IMPLEMENTING FACA -
ISSUES LIKELY TO BE ADDRESSED (Per June 10, 1997 FR Notice):

A. SCOPE AND APPLICABILITY

1. Review Applicability of Act to Pre-Existing Groups.

SAMHSA is not sure of the meaning of this. We interpret it to mean groups other than Federal advisory committees. In other words, if a group of citizens formed an advocacy organization representing States receiving SAMHSA block grant funds and they requested a meeting with SAMHSA, this should not be subject to FACA. However, if SAMHSA requested the meeting, we'd have to review the purpose of the meeting and the FACA questions to see if FACA applied.

If it means pre-existing Federal advisory groups that should be covered by FACA, then the regs need to prescribe how to proceed to bring it in line with FACA. (This could potentially open a door, so that folks could 'expedite' the process of establishing a committee and then clean up after themselves by doing the paperwork).

2. Revise Definition of "Utilize" Which Currently Appears in the Regulations at 41 CFR 101-6.1003.

"Utilized (or used), as referenced in the definition of advisory committee in this section, means a committee or other group composed in whole or in part of other than full-time officers or employees of the Federal Government with an established existence outside the agency seeking its advice which the President or agency official(s) adopts, such as through institutional arrangements, as a preferred source from which to obtain advice or recommendations on a specific issue or policy within the scope of his or her responsibilities in the same manner as that individual would obtain advice or recommendations from an established advisory committee."

SAMHSA has not had experience with this type of situation yet, but agrees that it needs clarification due to the potential for this happening and the numerous case law issues related to this definition.

3. Provide Additional Guidance on Committees Which Perform Primarily Operational as Opposed to Advisory Functions as Currently Defined at 41 CFR 101-6.1004(g).

"Any committee which is established to perform primarily operational as opposed to advisory functions. Operational functions are those specifically provided by law, such as making or implementing Government decisions or policy. An operational committee may be covered by the Act if it becomes primarily advisory in nature."

SAMHSA agrees that this definition needs clarification. For example, SAMHSA has two chartered initial review groups known as Special Emphasis Panels (SEPs). Some individuals believe that these groups perform the operational task of "prioritizing grant and contract applications/proposals on the basis of technical characteristics" measured by outside experts. In other words, they rank proposals so Federal staff are better able to apply the award criteria, enter negotiations and make funding decisions. This activity is mandated by SAMHSA's enabling legislation (Section 504 of the PHS Act; 42 USC 290aa-3).

The management of SEPs under FACA is time- and money-intensive. Each SEP panel is created for a particular review (based on technical expertise required for a given application or proposal); there are no standing members. All SEP meetings are closed to the public, in accordance with the Government in the Sunshine Act, so there is no clear benefit to the public to publicize these meetings in the Federal Register. It is almost procedurally impossible to comply with the FACA requirement to publish at least 15 days prior to the meetings, due to the nature of the grant and contract review cycles, especially when it comes to reviews for disaster assistance grants under FEMA. In addition, exhaustive records have to be maintained for such groups in order to be able to comply with the advisory committee reporting requirements.

Removing these committees from FACA coverage would reduce the number of Federal advisory committees, thereby providing room in the committee ceilings for those committees that were needed. To propose this action would not appear to be contrary to the original legislative intent in the creation of FACA (to prevent "domination of committees by representatives of industry, who are thereby afforded a special opportunity to influence federal policy on matters in which they have vested economic interest but which are also of vital concern to the public.")[1] Furthermore, in some of the case law, it would appear that some decisions would be the basis for such an action. In Sofamor Danek, related to a panel 'utilized' by the Agency for Health Care Policy & Research (AHCPR), the district court concluded, among other things, that its dismissal of the case was justified also by prior case law in which the FACA was held not to apply to advice "regarding a discrete and narrow scientific question rather than a public policy issue." SEPs offer a discrete and narrow scientific/technical review of specific grant and contract applications and proposals.

In addition, a key part of the argument in Nader v. Baroody is that there was "little or no continuity in the membership." This is absolutely true for the SEPs - each panel is created uniquely for the technical expertise required for each grant or contract requirements. Furthermore, individuals on the SEPs score each application/proposal independently, from which a total score is derived, using a formula. Therefore, it can be argued that these committees are 'operational' in nature - and thus beyond FACA's scope.

---

[1]Public Citizen Litigation Group, October 1989.

Removing SEPs from FACA coverage also makes sense from a reinvention perspective. It would eliminate extensive record-keeping and use of limited fiscal resources, for activities which offer little or no benefit to the public.

At the very least, if not determined to be operational, perhaps a separate category of committees can be established, under FACA, for initial review groups. SAMHSA firmly believes in the principles expressed within FACA, but under the current system, we see no benefit to the public from trying to follow the same procedures as our other committees.

4. Explain Exclusions from the Act's Coverage, Including New Provisions Based on Section 204(b) of the Unfunded Mandated Act, Public Law 104-4, Relating to State, Local and Tribal Government Representatives.

It is vital to SAMHSA to work with State, local, and tribal governments. As we move ahead with the Government Performance and Results Act (GPRA) and other recent initiatives working with States as partners, we need the regs to clarify (as broadly as possible) what types of communications are exempt from FACA. Government agencies that work with State, local and tribal governments need mechanisms to encourage dialogue rather than erect barriers to it. We endorse the components of the Unfunded Mandates Act, which allow for some streamlining of FACA requirements - such as a charter not counting against the committee ceiling. However, as we understand it, much of FACA still applies. There is still much to be done to allow for streamlining, recognizing these are usually temporary activities related to a specific question or task:

- is a charter even necessary or could a Memorandum of Understanding be drafted and a copy provided GSA?
- can the agency head appoint members without a lengthy process?
- can appointed 'members' be offices or organizations so that individual delegatees would participate at a given meeting?
- how does 'balance' apply to a committee of such individuals (since they have similar backgrounds)?
- does it serve the public to keep the same kinds of records as with FACA committees and prepare the same level of reports?

One of the questions agencies face is when is FACA triggered? For example, we might meet with only State and local government representatives on a particular issue and not invoke FACA; however, if we add 1 or 2 representatives from an organization of similar people (e.g., National Association of State Alcohol and Drug Abuse Directors) who are not also State representatives, then FACA applies?

One could make the case that such committees are 'operational' (using arguments similar to those used for exempting peer review groups from FACA) and therefore exempt from FACA?

B. STATUS OF INDIVIDUALS

1. Provide Definition of "Full Time Federal Employee" under the Act.

When FACA was written, there was little or no opportunity to have other than full time employment. Now, there are various workplace initiatives and opportunities for flexibility of an individual's work schedule. Currently, the way this is written in FACA, a part-time permanent employee cannot serve as the DFO. We recommend that the language read: "permanent Federal employee." However, we recognize that the regs cannot change the law but merely interpret it, so this may not be possible.

2. Clarify Status of Consultants to Advisory Committees.

Consultants should be clarified as they relate to committees. Consultants are primarily used for their particular expertise to bring knowledge to the committee to assist them in their deliberations. A consultant is an individual officially invited by the agency to participate in an official capacity - to speak to the Council or otherwise provide technical expertise on a matter. Other 'experts' may attend public meetings, but they have no formal role other than members of the public, because they attend of their own volition. They may speak during the public comment period, and a committee member may even ask them to answer a particular question, but these individuals are not paid an honorarium or reimbursed for travel, as official consultants are.

Consultants (whether appointed as SGEs or brought in under Professional Services Contracts) are not 'appointed' members and therefore cannot act as a member (e.g., sit at the table, participate in deliberations, or vote) except in some cases where they have been appointed by the agency as a temporary voting member for a given issue at a particular meeting.

C. CONSENSUS

1. Update and Expand References to "Consensus' Advice as a Factor in Determining the Act's Coverage to Specific Groups of Meetings.

Clarify how an agency can protect itself from FACA trouble when using advice from individuals (e.g., where the courts have found an agency utilized it as consensus advice). Clarify the difference between a group of individuals, acting as individuals, reaching consensus vs. when the agency solicits a consensus opinion. Distinguish also the difference between consensus and unanimous opinion.

D. ESTABLISHMENT AND OPERATION OF FEDERAL ADVISORY COMMITTEES

1. Revise Procedures for Establishment, Re-establishment, or Renewal of Advisory Committees.

Procedures for establishing committees should be streamlined (maybe on an-line fill in the blank charter?), especially as it relates to committees formed to meet an immediate problem (e.g., committees formed under Reg-Neg and Unfunded Mandates).

Why is it necessary to renew/recharter (full set of documents) every two years? Why can't a simple memorandum be developed from the agency head to GSA, saying the accomplishments of the committee have been reviewed (based on the GSA Report), and it is the agency's decision to retain the committee for another two years? This is particularly true for statutorily mandated committees.

2. Review Elements of "Balance" for Committee Membership.

Clarify 'balance.' FACA says, "require the membership of the advisory committee to be fairly balanced in terms of the points of view represented and the functions to be performed by the advisory committee" (PL 92-463 Section 5(b)(2)). Additionally, the PHS Act mandates SAMHSA's Councils to have 12 members - 9 professional members and 3 public members (from a variety of professions). This is an attempt to ensure some measure of balance.

In addition, the Department of Health and Human Services and SAMHSA have both tried to comply with the balance requirements by ensuring representation of both genders, breadth of racial/ethnic minority groups, geographic location, type of employment (e.g., states, universities, community organizations), etc.

However, it must be recognized that balance on a given committee depends somewhat on the issue before the committee. Some leeway must be left to the agency to determine if the committee is balanced; the regs should merely describe how agencies should go about balancing a committee's membership. For example, many committees would benefit from having a consumer serve as a regular member; others might want an individual consumer appointed as a temporary voting member for a particular meeting/issue only; it might be inappropriate for other committees to include a consumer as a member.

3. Expand discussion for closing an advisory committee meeting under the Government in the Sunshine Act and other relevant statutes.

SAMHSA believes it does not contribute to the public interest to publish Federal Register notices for each and every grant and contract review committee meeting. These meetings

are entirely closed to the public, and in the case of contract proposals, even the title of the RFP being reviewed is not made public (to protect the integrity of the procurement process). We propose that such meeting notices be able to be published annually as a blanket notice each year in January. Specific meeting dates and times can be readily determined by interested citizens and groups by contacting the individual listed as Contact in the Federal Register notice.

Furthermore, there are financial costs involved in publishing these notices. In our opinion, these costs are not offset by the theoretical benefit to the public of publishing each and every notice of peer review meetings individually. If necessary, a retrospective list of the previous year's meetings of peer review committee meetings could be published in order to provide public notification of an agency's activity.

FAX TRANSMISSION

US/EPA, REGION 8
999 18TH ST., SUITE 500 - 80C
DENVER, CO 80202-2466
303-312-6600
FAX: 303-312-6961

To:	Vincent Vukelich	**Date:**	July 8, 1997
Fax #:	202-273-3559	**Pages:**	4, including this cover sheet.
From:	Sonya S. Pennock		
Subject:	Comments on Advance Notice of Proposed Rulemaking - FACA		

COMMENTS:

U. S. ENVIRONMENTAL PROTECTION AGENCY
401 M Street, S.W.
WASHINGTON, D.C. 20460

FACSIMILE COVER SHEET

COMMUNITY INVOLVEMENT AND OUTREACH CENTER
OFFICE OF EMERGENCY AND REMEDIAL RESPONSE

FAX NUMBER 703-603-9100

PAGE 1 OF 3

TO: Mr. Vincent Vukelich

OFFICE/REGION: Committee Management Secretariat, General Services Administration

PHONE NUMBER: 202-273-3558 **FAX NUMBER:** 202-273-3559

FROM: Suzanne Wells

PHONE NUMBER: 703-603-8863

COMMENTS: Please accept our comments on the Advance Notice of Proposed Rulemaking regarding the Federal Advisory Committee Act (FACA). A copy of the Guidance mentioned in our comments is in the mail to your office. Thank you.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

JUL 14 1997

OFFICE OF
SOLID WASTE AND EMERGENCY
RESPONSE

Committee Management Secretariat
General Services Administration
Office of Government-Wide Policy
Room 5228-MC
1800 F Street NW
Washington D.C. 20405

Attention: FACA Regulations

Thank you for the opportunity to comment on the Advance Notice of Proposed Rulemaking regarding the Federal Advisory Committee Act (FACA) revisions.

The U.S. Environmental Protection Agency's Superfund program is particularly interested in commenting on this rulemaking because we are statutorily required to seek the public's input into our site cleanup decisions. One way in which we seek the public's input is through Community Advisory Groups (CAGs). As you will see from the enclosed "Guidance for Community Advisory Groups at Superfund Sites," these groups are intended to represent the diverse interests of a community. In addition, they notify the broader public of the opportunity to attend their meetings. To date, CAGs or similar community-based groups providing input into Superfund cleanup decisions have not been required to be chartered under FACA or burdened with FACA regulations.

We agree with GSA's assessment that "there is no clear answer to when a public involvement strategy or situation may 'trigger' the formal requirements regarding advisory committees under the Act." We believe community-based groups working together to solve local environmental problems should not be subject to FACA. Requiring such groups to be chartered under FACA or burdened with FACA regulations could be a disincentive to forming such a group. These groups have provided valuable input to EPA, and therefore, we recommend CAGs and other similar forms of public involvement not fall under FACA.

Thank you for consideration of our comments. If you have any questions about the CAGs established under Superfund, please contact Leslie Leahy at 703-603-9929. In addition, please add the following Superfund staff to your mailing list for materials regarding FACA Regulation revisions:

Suzanne Wells 5204G
USEPA
401 M Street SW
Washington D.C. 20460

Sincerely,

(b) (6)

Suzanne Wells, Director
Community Involvement and Outreach Center

cc: Hale Hawbecker, OGC
Elaine Davies, OERR

United States
Environmental Protection
Agency

Emergency and
Remedial Response
(5201G)

OSWER Directive 9230.0-28
PB94-963293
EPA 540-K-96-001
December 1995

EPA

Guidance for Community Advisory Groups at Superfund Sites

Acknowledgments

The Community Advisory Group guidance is the product of the efforts of many people; individuals from the following groups have participated in its review and development: EPA Regional Offices, EPA OSWER Offices, OERR Environmental Justice Task Force, National Environmental Justice Advisory Committee, Association of State and Territorial Solid Waste Management Officials and EPA's Office of General Counsel. In particular, the Community Involvement Team (OERR), Linda Garczynski (OSWER), Hale Hawbecker (OGC), Jane Lemke (WI), Verne McFarland (R6), Marilu Martin (R5), Marcia Murphy (CA), Murray Newton (OERR), Charles Openchowski (OGC), Sonya Pennock (R8), and Suzanne Wells (OERR) each have made valuable contributions to the development and quality of this guidance.

— Diana Hammer (OERR), Project Manager

Notice

The policies set out in this memorandum are intended solely as guidance. They are not intended, nor can they be relied upon, to create any rights enforceable by any party in litigation with the United States. EPA officials may decide to follow the guidance provided in this memorandum, or to act at variance with the guidance, based on an analysis of specific site circumstances. The Agency also reserves the right to change this guidance at any time without public notice.

For More Information on CAGs

Contact your Regional Community Involvement Manager or a staff member of the Community Involvement and Outreach Center at EPA Headquarters. (See the list of contacts in Appendix E.)

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1. Background

> **Environmental Justice Task Force**
> **Purpose of this Guidance**
> **Selecting Sites**

The United States Environmental Protection Agency (EPA) is committed to involving the public in the Superfund cleanup process. In fact, there are many examples throughout the Superfund program where community involvement has enhanced, rather than impeded the Superfund cleanup decision-making process. While recognizing that providing additional opportunities for community involvement may require additional time and slow the cleanup process down initially, EPA believes this is time well spent, and that early and effective community involvement will actually save time in the long run.

EPA is committed to early, direct, and meaningful public involvement and provides numerous opportunities for the public to participate in site cleanup decisions. One of these opportunities for community involvement, is the EPA's Technical Assistance Grants (TAGs) program. EPA awards TAGs to eligible community groups so they can hire their own, independent Technical Advisor, enabling community members to participate more effectively in the decision-making process at Superfund sites. For more information on the TAG program, see the "Superfund Technical Assistance Grants" quick reference fact sheet (EPA 540-K-93-001; PB93-963301).

Community Advisory Groups (CAGs) are another mechanism designed to enhance community involvement in the Superfund process. CAGs respond to a growing awareness within EPA and throughout the Federal government that particular populations who are at special risk from environmental threats—such as minority and low-income populations—may have been overlooked in past efforts to encourage public participation. CAGs are an effective mechanism to facilitate the participation of community members, particularly those from low-income and minority groups, in the decision-making process at Superfund sites.

1.1 Environmental Justice Task Force

The Office of Solid Waste and Emergency Response (OSWER) Environmental Justice (EJ) Task Force was established in 1993 to analyze environmental justice issues specific to waste programs and develop recommendations to address these issues. The EJ Task Force advised that the creation of Community Advisory Groups would enhance public involvement in the Superfund cleanup process. Specifically in its April 1994 report, titled OSWER Environmental Justice Task Force Draft Final Report (EPA 540-R-94-004), the Task Force recommended implementing a program involving CAGs at a minimum of ten sites nationwide by the end of FY94 and providing guidance to support the CAG activities.

1.2 Purpose of this Guidance

As lead Agency at a Superfund site, EPA has an important role to play in encouraging the use of Community Advisory Groups (see Section 10.3, under "Roles and Responsibilities"). This guidance document is designed to assist EPA staff [primarily Community Involvement Coordinators (CICs) and Site Managers, such as Remedial Project Managers, On-Scene Coordinators, and Site Assessment Managers] in working with CAGs at Superfund sites (this includes remedial and appropriate removal sites).

This guidance addresses the objectives, functions, membership, and scope of authority for CAGs. It emphasizes practical approaches and activities, and is designed to be flexible enough to meet the unique needs of individual local communities. The guidance is based on the Agency's experience in carrying out community involvement activities pursuant to the National Oil and Hazardous Substances Pollution Contingency Plan (NCP), the Superfund Amendments and Reauthorization Act of 1986 (SARA), and policy documents issued by EPA and other Federal agencies. It also draws on concepts articulated in the President's Executive Order on Environmental Justice 12898, EPA/OSWER's Environmental Justice Task Force report, the "Restoration Advisory Board Implementation Guidelines" developed by the EPA and the Department of Defense (9/94), and the "Interim Guidance for Implementing Restoration Advisory Boards" drafted by the California Environmental Protection Agency (11/93).

This guidance provides a number of considerations to assist Community Involvement Coordinators (CICs) and Site Managers in working with a successful CAG. **CAGs need not conform to all aspects of this guidance.** Consequently, this guidance is intended to provide a starting point or frame of reference to help groups organize and begin meeting. A CAG's structure and operation, however, should reflect the unique needs of its community.

EPA will not establish or control CAGs; however, the Agency will assist interested communities in CAG activities. Further, EPA anticipates that the CAGs will serve primarily as a means to foster interaction among interested members of an affected community, to exchange facts and information, and to express individual views of CAG participants while attempting to provide, if possible, consensus recommendations from the CAG to EPA.

1.3 Selecting Sites

While EPA is initially focusing the CAG concept and guidance on Superfund sites with environmental justice concerns, the methods and principles are intended to be applied broadly and to include other Superfund sites as well. In some cases, the sites selected for a CAG may already have some form of community advisory group and EPA could help formalize the group, recognizing it as being representative of the community. In other cases, sites may be selected where a community advisory group doesn't yet exist, but where a CAG would be useful to encourage full community participation in site cleanup activities. See Section 2.2, "Determining the Need for a CAG" for more information on appropriate sites for a CAG.

2. Community Advisory Group (CAG) Development

- **CAG Scope of Authority**
- **Determining the Need for a CAG**
- **Preparation for the CAG Information Meeting**
- **CAG Information Meeting**

Community Advisory Groups are important tools for enhancing community involvement in the Superfund process. Through CAGs, EPA seeks to achieve direct, regular, and meaningful consultation with all interested parties throughout all stages of a response action.

2.1 CAG Scope of Authority

A CAG should serve as a public forum for representatives of diverse community interests to present and discuss their needs and concerns related to the Superfund decision-making process with appropriate Federal and State/Tribal/local governments. The CAG is designed as a mechanism for all affected and interested parties in a community to have a voice and actively participate in the Superfund process. However, it is important to remember that the CAG is not the only mechanism for community involvement at a site; as the lead Agency, EPA continues to have the obligation to inform and involve the entire community through regular as well as innovative community involvement activities.

EPA cannot, by law, abrogate its responsibility to make the final decisions at a site; however, by providing the perspective of the local community, the CAG can assist EPA in making better decisions. A CAG that is broadly representative of the affected community offers EPA a unique opportunity to hear—and seriously consider —community preferences for site cleanup and remediation. It is particularly important that in instances where an EPA decision and/or response differs from a stated CAG preference regarding site cleanup, EPA accepts the responsibility of explaining its decision and/or response to CAG members.

A CAG allows the Agency to exchange information with members of the affected community and encourages CAG members to discuss site issues and activities among themselves. The CAG also can provide a public service to the rest of the affected community by representing the community in discussions regarding the site and by relaying information from these discussions back to the rest of the community. CAGs thus can be a valuable tool for both the Agency and communities throughout the cleanup process.

2.2 Determining the Need for a CAG

The CIC should consult with other site team members (for example, the Site Manager and Attorney) in selecting an appropriate site for a CAG. The team may consider a number of factors during the selection process, including: Generally, what is the level of community interest and concern about the site?

- Might that level of community interest and concern warrant a CAG?
- Has the community expressed an interest in forming a CAG?
- Does a group similar to a CAG exist?
- Do groups with competing agendas exist at the site?
- Are there any environmental justice issues or concerns regarding the site?
- What is the history of community involvement at the site?
- What is the likelihood of long-term cleanup activity at the site?

Depending on the status of the cleanup process at the site, substantial information may exist about the community. For example, if the site is in the RI/FS phase, the Community Relations Plan, developed based on interviews with community members, is a good information source.

A community with a high level of interest and concern about site activities should be a strong candidate for a CAG. In addition, a site in the

early stages of a long-term cleanup without an existing community group may be a strong candidate site for an effective CAG. Communities at removal sites, particularly non-time critical removal sites, also may benefit from a CAG (keeping in mind, however, the time necessary to begin CAG operations when considering a CAG for removal sites).

If a group exists which is representative of the local community (for example, a local environmental group that has been active at the site or a TAG recipient group), a CAG may not be appropriate—if the existing group can fulfill the role of a CAG. If competing groups exist at a site, however, their disparate interests and agendas can undermine even the best efforts of agencies, elected officials, and concerned citizens to forge a CAG. This situation should be given serious consideration in making the decision to promote CAGs at such sites.

A CAG can be formed at any point in the cleanup process but may be most effective early in the cleanup process. Generally, the earlier a CAG is formed, the more CAG members can participate in and impact site activities and cleanup decisions.

2.3 Preparation for the CAG Information Meeting

The CAG Information Meeting is the setting for introducing the CAG concept to the community. Before the CAG Information Meeting, the CIC may begin the process of informing and educating the community about the purposes of the CAG and opportunities for membership and participation. This is especially important at Superfund sites where the community may have had relatively limited participation in the Superfund process. This section offers suggestions, concerns, and methods that EPA (in conjunction with others such as State/Tribal/local governments) may use to notify a community about the formation of a CAG. These are not the only options—techniques will necessarily vary from site to site and from community to community. In many instances, it may be useful to target multiple newspapers as well as alternative media (for example, public service announcements on the radio, public access channels on cable television, free circulation newspapers) to more effectively reach out to communities. Other outreach options include flyers, announcements in local churches, etc. Remember also, that another important and effective method to "spread the word" about the CAG is through the personal relationships that Agency representatives have established in the community. No matter what method or media is used, EPA (in conjunction with others such as State/Tribal/local governments) must provide the information in a manner readily understandable to community members.

2.3.1 Fact Sheet

EPA (in conjunction with others such as State/Tribal/local governments) may prepare and distribute a brief fact sheet describing the CAG prior to the CAG Information Meeting. A sample CAG fact sheet is included as Appendix A. In preparing the fact sheet, EPA may consult with the State/Tribal/local government. EPA may wish to expand existing networks used in distributing information about public involvement activities for the distribution of CAG-related fact sheets and other materials.

Community interviews conducted prior to development of the Community Relations Plan for the site, as well as the plan itself, are potential sources of information to identify effective methods for distributing the CAG fact sheet.

Depending on the status of the response action, the interviews and plan may not have been completed for all sites. If this is the case, EPA staff may conduct limited community interviews with local officials and community leaders, making special effort to contact those leaders with ties to the environmental justice and other site-related concerns of the community. For example, these sources could include churches and community organizations in minority and low-income neighborhoods. This will ensure that credible information sources identified by members of the community are used to supplement and reinforce direct mailing of the fact sheet. In addition, copies of the fact sheet should be available in the information repositories and at the CAG Information Meeting.

The fact sheet is designed to describe the purpose of the CAG and membership opportunities and delineate the role of CAG members. If a significant segment of the community is non-English speaking or visually impaired, EPA (in conjunction with others such as State/Tribal/local governments) should translate the fact sheet for distribution to these members of the community.

2.3.2 Public Notice

EPA (in conjunction with others such as State/Tribal/local governments) may prepare a public notice or display ad to advertise the CAG Information Meeting in general circulation newspapers serving the affected communities around the site. To ensure that all segments of the affected population are notified, notices in newspapers that serve low-income, minority, and non-English speaking audiences in the community also should be considered.

The notice should be published approximately two weeks in advance of the CAG Information Meeting and should include the following information:

- Time and location of the meeting;
- CAG purpose and membership opportunities;
- The roles and responsibilities of CAG members;
- A statement that the meeting is open for public attendance and participation;
- Topics for consideration at the CAG Information Meeting; and
- Name and phone number of contact person(s) to obtain more information.

The public notice should appear in a prominent section of the newspapers, where it is likely to be read by the majority of community members. A sample CAG public notice is included as Appendix B.

2.3.3 News Release

EPA personnel (in conjunction with others such as State/Tribal/local governments) may prepare and distribute to the local media a news release to explain the purpose of the CAG and announce the time and location of the initial information meeting. Depending on local media coverage of Superfund and other environmental issues related to the site, it may be appropriate to prepare a more extensive media packet of information to update the local media on public involvement activities and overall response plans and progress.

2.3.4 Agenda

EPA, in consultation with the State/Tribal/local governments and residents, may develop an initial agenda for the CAG Information Meeting. The agenda should reflect important

community concerns raised in relation to the Superfund response. Again, the results of community interviews conducted in the process of developing Community Relations Plans and other community involvement activities may provide a source of information and background on community concerns. Demonstrating an awareness of and sensitivity to concerns expressed by the community is an important element in maximizing the potential benefits of CAGs.

2.4 CAG Information Meeting

EPA may sponsor the CAG Information Meeting and may consult with the State/Tribal/local government in its preparation. EPA (in conjunction with others such as State/Tribal/local governments) should attempt to hold the CAG Information Meeting as early as possible in the cleanup process.

EPA personnel (and/or others such as State/Tribal/local governments) may facilitate the CAG Information Meeting; however, for this and subsequent meetings, it may be preferable to have someone from the community with facilitation experience or a professional meeting facilitator serve as facilitator. A neutral facilitator is particularly effective at sites where some controversy is anticipated. Facilitation may produce a better sense of fairness and independence, helping to ensure more productive discussions.

The Information Meeting should serve to introduce the CAG concept to the community. The following topics may be appropriate to discuss at the meeting:

- Purpose and overview of the CAG;
- Goal of representing diverse community interests;
- Interface between the CAG and other community involvement activities;
- Membership opportunities;
- Suggested member selection process and timetable;
- Examples of a CAG Mission Statement and operating procedures (including community leadership);
- Suggested member responsibilities;
- Overview of site cleanup plans and progress; and
- Open discussion/question and answer period.

The Information Meeting and subsequent CAG meetings should be held in a central location and at a convenient time for community members. In addition, EPA (and/or others such as State/Tribal/local governments) should consider requirements of the Americans with Disabilities Act (ADA) and the Rehabilitation Act of 1994 in choosing a location (for example, accessibility by wheelchairs and availability of signers and readers, as necessary, to assist hearing and visually impaired participants).

Resources permitting, EPA (and/or others such as the State/Tribal/local governments) may provide appropriate administrative and logistical support for arranging the meeting and documenting its proceedings. Preparation of a concise and easy-to-read summary of the meeting also should be considered. Such a summary will help facilitate effective communication with local community members. The summary should be translated for interested members of the community who are non-English speaking or visually impaired. The summary should be made available for public review in the information repositories and through other dissemination methods no later than one month

after the Information Meeting. Copies of the summary also may be mailed to all community members who attend the initial meeting and to those who are on mailing lists used for other community involvement activities related to the site.

3. CAG Startup

The time period between the CAG Information Meeting and the implementation of a fully functional CAG may vary from site to site. EPA should encourage CAGs to be in full operation within six months after the information meeting, in order to maximize their effectiveness in the Superfund cleanup decision-making process. There are several key activities that should be completed during this time period to ensure successful CAG operation. These activities are described in the following sections.

4. CAG Membership

- **Size of the CAG**
- **Membership Composition**
- **Roles and Responsibilities of CAG Members**
- **Membership Solicitation**
- **Membership Selection Models**

4.1 Size of the CAG

The number of members in the CAG may vary from site to site depending on the composition and needs of the affected community. The CAG should determine the size of its membership; when doing so, the CAG should consider the following factors:

- Diversity of the community;
- CAG workload; and
- Effective group discussion and decision-making (i.e., pros/cons of larger vs. smaller groups).

Federal Facility Environmental Restoration Advisory Boards, groups similar to CAGs, generally average around 20 members. While it often is difficult to ensure that everyone has an opportunity to participate and to achieve closure on discussions in larger groups, the CAG should be large enough to adequately reflect the diversity of community interests regarding site cleanup and reuse.

4.2 Membership Composition

To the extent possible, membership in the CAG should reflect the composition of the community near the site and the diversity of local interests, including the racial, ethnic, and economic diversity present in the community—the CAG should be as inclusive as possible. At least half of the members of the CAG should be local community members (sometimes referred to as "near neighbors").

CAG membership should be drawn from the following groups:

- Residents or owners of residential property near the site and those who may be affected directly by site releases;
- Those who potentially may be affected by releases from the site, even if they do not live or own property near the site;

- Local medical professionals practicing in the community;
- Native American tribes and communities;
- Representatives of minority and low-income groups;
- Citizens, environmental, or public interest group members living in the community;
- TAG recipients, if a TAG has been awarded at the site;
- Local government, including pertinent city or county governments, and governmental units that regulate land use in the vicinity of the site;
- Representatives of the local labor community;
- Facility owners and other significant PRPs;
- The local business community; and
- Other local, interested individuals.

Clearly, persons with an obvious conflict of interest at the site should not be members of the CAG, e.g., remedy vendors, lawyers involved in pending site litigation, non-local representatives of national groups, and others without a direct, personal interest in the site.

In order to prevent the PRP (or another interest group) from dominating CAG discussions, the community shall have the authority to limit the number of these representatives or designate them as ex-officio members.

4.3 Roles and Responsibilities of CAG Members

Generally, CAG members will be expected to participate in CAG meetings, provide data and information to EPA on site issues, and share information with their fellow community members. EPA (along with State/Tribal/local governments, as appropriate) should help the CAG clearly define and maintain these roles and responsibilities (see Section 10.2, under "Roles and Responsibilities").

4.4 Membership Solicitation

For the CAG concept to be successful, the membership of each CAG should reflect the diverse interests of the community in which the Superfund site is located. It is also important that each community have the lead role in determining the membership appropriate for its CAG. This will help encourage participation in and support for the CAG. EPA should not select or approve/disapprove individual CAG members but must certify that the CAG is representative of the diverse interests of the community.

EPA, in coordination with the State/Tribal/local governments, should inform the community about the purposes of the CAG and opportunities for membership and participation. This public outreach effort needs to be tailored to the individual community in which the CAG is to be formed. This is especially important at sites which are in the early stages of the Superfund cleanup process, sites at which opportunities for community participation have been limited, and/or sites where there has been relatively little community or media interest.

EPA (in coordination with others such as the State/Tribal/local governments) should make every effort to ensure that all individuals and groups representing community interests are informed about the CAG and the potential for membership so that each has the opportunity to participate in the CAG. For example, EPA

may begin the public outreach effort regarding CAG membership before the CAG Information Meeting by distributing the CAG fact sheet and publishing public notices and news releases.

Depending on the results of community-wide efforts to solicit nominations for CAG membership, it may be necessary to refine and further focus efforts for specific groups. These efforts may be reinforced with a letter to individuals and groups representing diverse community interests. A sample letter regarding CAG membership is included as Appendix C. CAG information also can be mailed to those expressing interest generally in the site and/or specifically in the CAG. CAG information also should be made available through the local information repositories. The information also may be reformatted and posted in other visible locations such as information kiosks and community centers.

If there is not enough community interest to form a CAG after all solicitation efforts have been exhausted, EPA (in conjunction with others such as State/Tribal/local governments) may issue a public notice through all available outlets to announce that efforts to form a CAG have been unsuccessful. A sample of such a public notice is included as Appendix D.

4.5 Membership Selection Models

The selection of CAG members should be accomplished in a fair and open manner in order to maintain the level of trust needed for successful CAG operation. The members of the CAG should reflect the composition of the community and represent the diversity of local interests. In designing the method for developing a CAG that is most appropriate for the affected community, it may be useful for EPA (in conjunction with others such as State/Tribal/local governments) to offer some type of facilitation.

The following Membership Selection models are examples that may be used and adapted to best meet the particular needs of a community. Of course, each community is unique and no one model will work in all instances; in fact, it may be appropriate to develop an entirely different model for selecting CAG members. Similarly, formal membership selection models, such as those described in this section, may not always be necessary. For example, selecting a group may be as simple as widely advertising the opportunity to join the CAG and then recognizing the CAG as consisting of the respondents. The key is that the CAG represent the interests of the community and that the CAG be able to function as a group. The exact selection process is secondary, as long as the process is fair and open.

4.5.1 Screening Panel Model

Under this model, EPA, consulting with and involving the State/Tribal/local government, could assist the community in organizing a short-term Screening Panel to review nominations for membership on the CAG prior to final member selection. After the opportunity to form a CAG has been announced, the local community should identify (using a fair and open manner) CAG members who represent the diverse interests of the community. The panel should, to the extent practical, reflect the diversity of interests in the community since the panel would be expected to choose CAG members who are equally representative. The panel may select a chairperson from among its members.

The Screening panel should consider establishing and publicizing the following:

- Procedures for nominating members for the CAG, including the way members of the community can nominate themselves to be CAG members (panel members also may nominate themselves to be CAG members.);
- The process for screening nominations and making recommendations for membership;
- The criteria to be used in screening nominations and determining membership recommendations; and
- A list of any recommended nominees for membership on the CAG.

The Screening Panel Chairperson may forward the panel's recommended list of nominees to the appropriate EPA Regional Administrator for review and comment (not for approval/disapproval of individuals) with regard to its ability to represent the interests of the community.

4.5.2 Existing Group Model

Under this model, an existing group in the community—such as a group with a history of involvement at the Superfund site—may be selected as the CAG for that community, if, in fact, it does represent the diverse interests in the community. If the group does not appear representative of the community, EPA may ask the group to expand its membership to include any community interests not represented.

4.5.3 Core Group Model

Under this model, EPA, consulting with and involving the State/Tribal/local governments, could select a Core Group that represents the diverse interests of the community. EPA (in conjunction with others such as State/Tribal/local governments) may remind the community that a person may nominate himself or herself through the application process. For example, members of the Core Group could include seven members representing the following interests: two local residents, local government, environmental, civic, labor, and business. The members of this Core Group then would select the remaining members of the CAG in a fair and open manner.

4.5.4 Self-Selecting Group Model

Under this model, after EPA (in conjunction with others such as State/Tribal/local governments) announces the opportunity to form a CAG, the local community identifies (in a fair and open manner) CAG members who they believe represent the diverse interests of their community. Realistically, it may take some communities a significant amount of time to fully select the CAG members.

4.5.5 Local Government Group Model

Under this model, the local government would select, in a fair and open manner, members of the community to serve on the CAG. This model may be appropriate at sites where a positive working relationship and established communication channels exist between the local government and the community.

5. CAG Member Training

Many of those selected as members of the CAG may require some initial training to enable them to perform their duties. EPA may work with the State/Tribal agencies, the local government(s), local universities, the PRP(s), and others, to provide training and prepare

briefing materials for CAG members. EPA also may work with these organizations and appropriate local groups to develop a method for quickly informing and educating new CAG members about cleanup issues, plans, and progress. Every effort should be made to tailor the training to the specific needs of the CAG members. For example, some CAG members may require more extensive training than others; similarly, some may need training materials in alternative formats, such as in a language other than English. It is extremely important for the success of the CAG process that all members have an adequate opportunity to understand the Superfund process and the cleanup issues related to their respective sites. It also is important that the CAG function as a group, meaning some CAGs may need training on how to function effectively as a group.

Training may be accomplished at regular CAG meetings and/or through activities such as the following:

- Formal training sessions;
- Briefing books, fact sheets, and maps; and
- Site tours.

Every effort should be made to provide CAG members with appropriate and necessary training, subject to available resources.

Technical staff from local, State/Tribal, and Federal agencies involved in site cleanup may attend CAG meetings. They may serve as technical resources and provide information about their respective areas of expertise to CAG members.

6. Administrative Support for the CAG

EPA, together with State/Tribal governments, the local government(s), local universities, the PRP(s), and others may assist the CAG with administrative support on issues relevant to the Superfund site cleanup and decision-making process.

Resources permitting, EPA also may expand existing site contractor support work assignments, for example, to provide administrative support and translate documents with EPA staff oversight.

Administrative support for the CAG may include the following:

- Arranging for meeting space in a central location;
- Preparing and distributing meeting notices and agenda;
- Taking notes during meetings and preparing meeting summaries;
- Duplicating site-related documents for CAG review;
- Duplicating and distributing CAG review comments, fact sheets, and other materials;
- Providing mailing services and postage;
- Preparing and placing public notices in local newspapers;
- Maintaining CAG mailing lists;
- Translating or interpreting outreach materials and CAG meetings in cases where there is a

significant non-English speaking portion of the community; and

- Facilitating CAG meetings and special-focus sessions, if requested by the CAG.

After CAG members have been selected, EPA, in coordination with the State/Tribal agencies and the local government, may assist the CAG in developing a news release or fact sheet announcing the startup of the CAG and providing the names of CAG members. The news release or fact sheet also can be used as a vehicle for publicly thanking all members of the community who expressed an interest in CAG participation, encouraging their continued involvement through attendance at CAG meetings, and announcing the first CAG meeting.

7. CAG Operations

- **Chairperson**
- **Mission Statement and Operating Procedures**
- **Meetings**

7.1 Chairperson

CAG members may select a Chairperson from within their ranks and determine an appropriate term of office. It may be useful to advise that the Chairperson be committed to the CAG and willing to serve for an extended period of time (e.g., two years) to ensure continuity. Members have the right and responsibility to replace the Chairperson as they believe necessary. The processes for selecting and dismissing a Chairperson should be detailed in the CAG's operating procedures.

7.2 Mission Statement and Operating Procedures

Each CAG should develop a Mission Statement describing the CAG's specific purpose, scope, goals, and objectives. The mission statement and subsequent CAG activities should focus on actions related to Superfund site issues consistent with the purpose of a CAG.

Each CAG should develop its own letterhead. Each CAG also should develop a set of procedures to guide day-to-day operations. Topics to be addressed in these operating procedures include the following:

- How to fill membership vacancies;
- How often to hold meetings;
- The process for reviewing and commenting on documents and other materials;
- How to notify the community of CAG meetings;
- How the public can participate in and pose questions during CAG meetings; and
- How to determine when the CAG has fulfilled its role and how it will disband.

7.3 Meetings

All CAG meetings should be open to the public. The meetings should be announced publicly (via display ads in newspapers, flyers, etc.) well enough in advance (e.g., two weeks) to encourage maximum participation of CAG and community members.

EPA personnel (and/or others such as State/Tribal/local governments) may facilitate CAG meetings, however, it may be preferable to use

someone from the community with facilitation experience or a professional meeting facilitator. A neutral facilitator is particularly effective at sites where some controversy is anticipated. Facilitation may produce a better sense of fairness and independence, helping to ensure more productive discussions. If a facilitator is regularly used during CAG meetings, it may be helpful to further clarify both the Chairperson's and facilitator's roles to avoid direct conflict between the facilitator and Chairperson.

The intent of the CAG is to ensure ongoing community involvement in Superfund response actions. As such, regular attendance at CAG meetings by all CAG members should be anticipated. Even though they are not CAG members, the EPA Site Manager and the CIC may attend meetings and encourage representatives of other pertinent Federal agencies and State/Tribal/local governments to attend meetings as well. Governmental attendees should not be so numerous, however, as to inhibit meeting discussions. Consistent attendance, however, can demonstrate commitment to meaningful public participation in the cleanup process.

7.3.1 Meeting Frequency

CAG meetings should be scheduled on a regular basis. CAG members should determine the frequency of CAG meetings based on the needs at their particular site. Meetings should be held often enough to allow the CAG to respond to site issues within specified timeframes and allow for timely communication of CAG actions and site activities to the rest of the community. Frequency of meetings should be covered in the CAG's operating procedures.

7.3.2 Location

The CAG meetings should be held in a location agreed upon by CAG members. It is useful to consider a location convenient to CAG members, as well as central enough to encourage attendance by other interested members of the community. Meeting spaces such as local libraries, high schools, and senior centers may be acceptable locations. The location should meet requirements of the Americans with Disabilities Act and the Rehabilitation Act of 1994 (for example, accessibility for those in wheelchairs).

7.3.3 Meeting Format

The format for CAG meetings may vary depending on the needs of the CAG. A basic meeting format might include:

- Review of "old" business;
- Status update by the project technical staff and CAG member discussion;
- Discussion and question/answer session involving members of the public in attendance;
- Summary and discussion of "action items" for the CAG; and
- Discussion of the next meeting's agenda.

Prior to announcing each meeting, CAG members may wish to agree upon the meeting's purpose, agenda, and format. If necessary, arrangements should be made to provide a translator or interpreter and/or facilitator. EPA (in conjunction with others such as State/Tribal/local governments) may assist the CAG in making appropriate arrangements.

7.3.4 Special-Focus Sessions

The CAG also may consider holding special-focus sessions from time to time. These meetings would focus on a single topic and provide an opportunity for the CAG to solicit input, discuss, or gather information on a specific issue

requiring attention. If an expert cannot attend a special-focus session—travel and attendance in person may not always be possible—it may be useful for the CAG to schedule a conference call with that expert to discuss a particular issue. EPA (in conjunction with others such as State/Tribal/local governments) may provide support for special-focus sessions on issues relevant to the Superfund site cleanup and decision-making process.

7.3.5 Meeting Documentation

The CAG should prepare a concise summary of each meeting, highlighting the topics discussed, agreements reached, and action items identified. EPA and others such as the State/Tribal/local governments may provide support for this effort. The CAG may want to consider preparing a summary, rather than a verbatim transcript, to facilitate effective communication with local communities. If a significant segment of the affected population is non-English-speaking or visually impaired, they also should translate the summary, as appropriate, for these members of the community.

The meeting summary should be available for public review in the information repositories and through other dissemination methods within one month of the meeting. Copies of the summary also may be mailed to all community members who attended the meeting and to those who are on the CAG mailing list. If the CAG mailing list is larger than EPA's site mailing list, EPA may expand its mailing list to include interested community members from the CAG list.

8. CAG Response to Requests for Comments

EPA (in conjunction with others such as State/Tribal/local governments) should make every effort to involve the CAG during the early stages of developing documents—for example, during the scoping stage.

When EPA offers CAG members the opportunity to review and comment on documents, it may be helpful for EPA's technical staff (and from other appropriate agencies) to conduct a brief walk-through of each document prior to the CAG members' review. This overview may include explaining the goals and significance of each document in the cleanup process.

EPA should consider making all documents available to the CAG for the same length of time as to other groups—such as the State/Tribal and peer review groups. The duration of comment periods for some Superfund site-related documents, such as the Remedial Investigation/Feasibility Study (RI/FS) and the Proposed Plan and Records of Decision (RODs), are already established. CAG members, however, may be asked to review and comment on a variety of documents and other information for which comment period durations have not been established. EPA should explain to the CAG that, in some cases, time allotted for review of these materials may have to be less than 30 days. In those cases, the CAG should be ready to complete its review and provide comments in the shorter time period.

The CAG may determine the most efficient way to respond to requests for review and comment on key documents. The CAG

should choose, on a case-by-case basis, the most appropriate mechanism to ensure that comments are provided within specified timeframes. One option available for the CAG to gather input from its constituents is by holding a special-focus meeting. To assist in the process, EPA (in conjunction with others such as State/Tribal/local governments) should prepare executive summaries in plain language describing the document and its key points.

9. EPA Response to Comments from the CAG

Since EPA representatives may attend CAG meetings regularly, EPA may have the opportunity to respond to many CAG comments on key documents and other issues in the context of meeting discussions. These responses should be documented as part of the interchange during the CAG meeting and, unless otherwise stated, should not be considered part of the formal Agency "Response to Comments" (as required under Sections 113 and 117 of CERCLA and 40 CFR 300 of the National Contingency Plan). EPA should recognize the nature of the comments (whether statements of individual preferences or statements supported by all CAG members), and give the comments corresponding weight for consideration. In cases where there are numerous comments to address in a meeting context, EPA may respond to them in writing.

10. Roles and Responsibilities

- **CAG Chairperson**
- **CAG Members**
- **EPA (as Lead Agency)**
- **State/Tribal Regulatory Agency**
- **CAG - TAG Interface**

EPA is committed to early, direct, and meaningful public involvement. Through CAGs, community members have a direct line of communication with EPA (as well as with the State/Tribal/local governments, depending on their level of involvement) and many opportunities for expressing their opinions. As a representative public forum, CAG members are able to voice their views on cleanup issues and play an important role in cleanup decisions. This is especially important before key points in the cleanup process. For example, CAG members may express preferences for the type of remedy, cleanup levels, future land use, and interaction with the regulatory agencies. Since the CAG, by definition, is intended to be representative of the affected community, the regulatory agencies will give substantial weight to the preferences expressed by CAG members. This is particularly important if the preferences reflect the position of most CAG members or represent a consensus from the CAG. EPA must not only listen to views expressed by CAG members but address their views when making site decisions.

EPA, the State/Tribal/local governments, the CAG Chairperson, and CAG members each have an important role to play in the development and operation of the CAG and in contributing to its effectiveness as a forum for meaningful public participation in Superfund response actions.

The following list, while not comprehensive, includes some of the key functions of each player.

10.1 CAG Chairperson

1. Prepare and distribute an agenda prior to each CAG meeting.
2. Ensure that CAG meetings are conducted in a manner that encourages open and constructive participation by all members and invites participation by other interested parties in the community.
3. Ensure that all pertinent community issues and concerns related to the Superfund site response are raised for consideration and discussion.
4. Attempt, whenever possible, to reach consensus among CAG members by providing official comments or stating positions on relevant issues and key documents.
5. Facilitate dissemination of information on key issues to the community.

10.2 CAG Members

1. Serve as a direct and reliable conduit for information flow to and from the community. CAG members have a responsibility to share information with other members of the affected community—the people they represent. Their names should be publicized widely within the local community to ensure that community members and interest groups have ready access to CAG members. If CAG members do not wish to have their phone numbers listed publicly, an alternative contact system should be explored to ensure that the community has access to CAG members.
2. Represent not only their own personal views, but also the views of other community members while serving on the CAG. CAG members should honestly and fairly present information they receive from members of the community; tentative conclusions should be identified properly as such.
3. Review information concerning site cleanup plans, including technical documents, proposed and final plans, status reports, and consultants' reports and provide comments and other input at CAG meetings and other special-focus meetings.
4. Play an important role at key points in the cleanup decision-making process by expressing individual community preferences on site issues.
5. Attempt, whenever possible, to achieve consensus with their fellow members before providing official comments or stating positions on relevant issues and key documents.
6. Assist the Chairperson in disseminating information on key issues to the community.
7. Attend all CAG meetings.
8. Be committed to the CAG and willing to serve for an extended period of time (e.g., two years). Terms may be staggered for continuity.
9. Serve voluntarily and without compensation.

10.3 EPA (as Lead Agency)

1. Provide information on the opportunity to form the CAG.

2. Attend CAG meetings to provide information and technical expertise on Superfund site cleanup.

3. Facilitate discussion of issues and concerns relative to Superfund actions.

4. Listen and respond to views expressed by CAG members, giving them substantial consideration when making site decisions, especially when views are those of most or all CAG members.

5. Work with others, as appropriate, to support and participate in training to be provided to CAG members.

6. Assist the CAG with administrative and logistical support and meeting facilities.

10.4 State/Tribal Regulatory Agency

1. Attend all CAG meetings.

2. Serve as an information referral and resource bank for the CAG on State- or Tribal-related issues.

3. Support training to be provided to CAG members.

4. If the lead agency, assume responsibilities under Section 10.3.

10.5 CAG - TAG Interface

TAG recipients can use their TAG funds to hire their own independent Technical Advisor to help them better understand and more effectively participate in the decision-making process at Superfund sites.

If a TAG has been awarded to a community group for work at this particular site (with the CAG), the Region should encourage a representative of the TAG group to be a member of the CAG. The Regions also should encourage the TAG and CAG to work together toward common goals with respect to site remediation.

If no TAG currently exists for this site, community members are still eligible and are encouraged to apply for a TAG. *Having a CAG at a site in no way precludes an eligible group at that same site from receiving a TAG.*

Points to Keep in Mind Regarding Community Advisory Groups

- Consult with and involve appropriate State and Tribal Governments.
- Consult with and involve appropriate local governments.
- Involve communities EARLY in the Superfund process.
- Maintain open communication channels.
- Share information.
- Be sincere.

11. Appendices

COMMUNITY ADVISORY GROUP (CAG)
(*Name and Location of Site*)

The U.S. Environmental Protection Agency (EPA) believes it may be useful for the community (*communities*) of (*name of community or communities affected*) to establish a Community Advisory Group (CAG) to ensure that all segments of the community have an opportunity to participate in the decision-making process at (*name of the site*).

The Superfund program under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) covers the cleanup of sites involving the improper disposal of hazardous substances throughout the country. Community involvement is an important element of the Superfund process, and EPA encourages it. EPA's comprehensive Community Involvement Program for (*name of the site*) began in (*date*). (*Provide a brief description of accomplishments of the Community Involvement Program at this site, if possible.*)

EPA, in cooperation with (*name of the State/Tribal Regulatory Agency and any other parties to the cleanup agreement*), has begun work to cleanup (*name of the site*).

(*Provide a brief description of the site and the cleanup-related activities to date.*)

A Community Advisory Group (CAG) provides a setting in which representatives of the local community can get up-to-date information about the status of cleanup activities, as well as discuss community views and concerns about the cleanup process with EPA, the State/Tribal regulatory agency, and other parties involved in cleanup of the Superfund site. **The CAG is a public forum in which all affected and interested parties in a community can have a voice and actively participate in the Superfund process.**

Getting Involved. CAGs are made up of members of the community. CAG membership is voluntary and members should be willing to serve two-year terms. CAG members will meet regularly and review and comment on technical documents and plans related to the environmental studies and cleanup activities at (*name of site*). Members will help EPA and the community exchange information about site activities and community concerns. CAG members will meet with individuals and groups in the community to obtain their views and hear their concerns related to site cleanup. **All CAG meetings will be open to the public.** CAG members will be chosen from among nominations submitted by individuals and groups in the community. (*May provide more details about the specific membership selection model here.*) **The deadline for membership application is (*date*).**

For More Information Contact: (*local contact name, address, and telephone number*).

(*Name and Location of Site*)
Formation of Community Advisory Group

The U.S. Environmental Protection Agency (EPA) believes it may be useful for the community (*communities*) of (*name of community or communities affected*) to establish a Community Advisory Group (CAG) to ensure that all segments of the community have an opportunity to participate in the decision-making process at (*name of the site*).

The Superfund program involves cleaning up hazardous waste sites throughout the country. EPA encourages community involvement and considers it to be an important element of the Superfund process.

The CAG will provide a setting in which representatives of the local community can get up-to-date information about the status of cleanup activities, as well as discuss community views and concerns about the cleanup process with EPA, the State regulatory agency, and other parties involved in cleanup of the site. **The CAG will be a public forum in which all affected and interested parties in a community can have a voice and actively participate in the Superfund process.**

EPA will sponsor a meeting on (*date*) at (*time*) to discuss the purpose of the CAG, provide information on how CAG members should be chosen, and answer questions concerning cleanup plans and activities at the site. (*Provide a brief description of specific site-related issues to be discussed.*) The meeting will be held at (*meeting location address*).

The CAG will be made up of members of the community. CAG membership is voluntary and members serve without compensation. Members should be willing to serve two-year terms. The CAG will meet regularly to review and comment on technical documents and plans related to the environmental studies and cleanup activities at (name of site) and to relay community views and concerns related to the site. **All CAG meetings will be open to the public, and all members of the community are encouraged to participate.**

For more information about the CAG, contact: (*local contact name, address, and telephone number*).

APPENDIX C: Sample CAG Letter

Dear (*name of Community Member/Organization*):

The community (*communities*) of (*name of community or communities affected*) is establishing a Community Advisory Group (CAG) to ensure that all segments of the community have an opportunity to participate in the decision-making process at (*name of the site*).

The Superfund program involves cleaning up hazardous waste sites throughout the country. EPA encourages community involvement—an important element of the Superfund process.

The CAG will provide a setting in which representatives of the local community can get up-to-date information about the status of cleanup activities, as well as discuss community views and concerns about the cleanup process with EPA, the State/Tribal regulatory agency, and other parties involved in cleanup of the site.

The CAG will be made up of members of the community, and members should reflect the diverse interests in the community. CAG membership is voluntary and members serve without compensation. Members should be willing to serve two-year terms. The CAG will meet regularly to review and comment on technical documents and plans related to the environmental studies and cleanup activities at (*name of site*) and to relay information between EPA and the community about the ongoing activities at the site. They will be expected to meet often with individuals and groups in the community to obtain their views and hear their concerns related to site cleanup issues.

CAG membership offers an outstanding opportunity to represent the community and help ensure the most effective remediation of the (*name of site*).

If you have any questions about CAGs, please call _____ at _____.

Sincerely,

(name of EPA Regional CIC
and, if possible, a local community leader)

Enclosure

(*Name and Location of Site*)
Insufficient Community Interest for Community Advisory Board (CAG)

The U.S. Environmental Protection Agency (EPA) believed it would be useful for the community (or communities) of (*name of community or communities affected*) to establish a Community Advisory Group (CAG) to ensure that all segments of the community have an opportunity to participate in the decision-making process at (*name of the site*).

The CAG would provide a setting in which representatives of the local community could get up-to-date information about the status of cleanup activities, as well as discuss community views and concerns about the cleanup process with EPA, the State/Tribal regulatory agency, and other parties involved in cleanup of the site. **The CAG would be a public forum in which all affected and interested parties in a community would have a voice and could participate actively in the Superfund process.**

Efforts to encourage members of the community to serve as CAG members began on (*date*). These efforts included direct communication with individuals and organizations in the community (*be specific in terms of the outreach effort*) as well as a public meeting in which the purpose of the CAG and the roles and responsibilities of CAG members were discussed.

Despite these efforts, members of the community have not expressed enough interest so far to ensure full participation by all segments of the community. Since these efforts to stimulate interest in a CAG in (*name of community*), have not been successful, EPA will not continue to encourage a CAG to form at (*name of site*). If in the future, community members express an interest in forming a CAG, EPA may reconsider this decision.

If You Have Any Questions Contact: (*local contact name, address, and telephone number*).

APPENDIX E: List of Community Involvement Managers Nationwide

Region 1
US EPA
John F. Kennedy Federal Bldg. Rm. RPS-74
Boston, MA 02203
Johanna Hunter
617-565-3425

Region 2
US EPA (26-OEP)
290 Broadway
26th Floor
New York, NY 10007
Lillian Johnson
212-637-3675

Region 3
US EPA (3EA21)
841 Chestnut Street
Philadelphia, PA 19107
Al Peterson
215-597-9905

Region 4
US EPA
Waste Management Division
345 Courtland St., NE
Atlanta, GA 30365
South Remedial Branch:
Betty Winter (AL, GA, MS)
404-347-2643 x6264
1-800-435-9234
Rose Jackson (South FL)
404-347-2643 x6272
Carleen Wakefield (North FL)
404-347-2643 x6256

North Remedial Branch:
Cynthia Peurifoy (SC)
404-347-7791 x2072
1-800-435-9233
Diane Barrett (NC)
404-347-7791 x2073
Cindy Gibson (SC, KY)
404-347-7791 x2036
Emergency Response Branch:
Michael Henderson (All Region 4 States)
404-347-3931 x6106
1-800-564-7577

Region 5
US EPA (PS19-J)
Metcalfe Federal Bldg.- 19th floor
77 W. Jackson Blvd.
Chicago, IL 60604
Toni Lesser
312-886-6685

Region 6
US EPA (6HMC)
First International Bank Tower & Fountain Place
1445 Ross Ave., 12th Floor
Dallas, TX 75270-2733
Verne McFarland
214-665-6617

Region 7
US EPA
726 Minnesota Ave.
Kansas City, KS 66101
Rowena Michaels
913-551-7003

Region 8
US EPA (80EA)
999 18th St.
Denver, CO 80202
Sonya Pennock
303-312-6600

Region 9
US EPA (H-1-1)
Office of Community Relations
75 Hawthorne Street
San Francisco, CA 94105
Dianna Young
415-744-2178

Region 10
US EPA (HW-117)
1200 6th Ave.
Seattle, WA 98101
Michelle Pirzadeh
206-553-1272

Headquarters
Community Involvement and Outreach Center
Office of Emergency and Remedial Response
US EPA (5203G)
401 M St., SW
Washington DC 20460
Suzanne Wells
703-603-8863

Author: Susan Courtney at GSA-MC
Date: 7/14/97 9:38 AM
Priority: Normal
TO: Vincent Vukelich
Subject: Suggested Improvements for GSA Regs - FACA

Vince: Listed below are some items that arise fairly consistently in our FACA courses as well as telephone inquiries. They are in no particular priority order nor are they specified for the guidance handbook vs. the proposed regulation itself. No doubt many are covered in other comments you have received, however, here they are as promised:

1. Clarification on whether it's ok to run multiple federal register notices for a committee's meeting events during the year.

2. Clarification on whether a charter requires a signature.

3. Raising awareness that regs are definitive, but caselaw dictates overall interpretation of FACA. This is not clear to many, since few really want to analyze caselaw at any length.

4. Clarification the definition of an advisory committee, what is, what isn't, how do I know, what tells me?

5. Stronger language on one-time meetings -- often interpreted different ways

6. Clarification on recordkeeping requirements -- how long does the committee/agency/CMO keep the committee files once they have terminated? Can they go to the records center for storage if the committee has been meeting for 10 years or more and the agency has run out of space?

7. Selection of members - strengthen language that lets folks know that agencies are responsible for membership selection/balance. Not up to GSA--we cannot interpret for them. Clarify solicitation of member process.

8. Strengthen the language about agency heads having the final determination in establishing an advisory committee. It is between they and OMB, not GSA.

9. Consider incorporating ceiling language in the regs should we forecast this exercise to be around for awhile.

10. Clarify guidelines on what public participation means or let the agencies come up with their own guidelines.

11. Strengthen language in guidance handbook or regulation to incorporate the partnership between the Library of Congress (records).

12. Strengthen language in guidance handbook or regulation to incorporate the partnership with the Office of Federal Register and how to get help, i.e., discounts, multiple listings, emergency assistance.

13. Clarify precisely what documents are needed to be sent to the Library of Congress from a committee.

14. Incorporate any resources in the guidance handbook that outlines

the SWAT team approach.CHowton suggested for doing committtee management effectively.

15. DOI ruling -- Peer review/Scientific review

-Susan

From: **SU ROLLE**
Interagency Liaison
Forest Service/
Bureau of Land Management
Applegate Partnership

541
(503) 770-2248
Fax (503) 770-2400
FS DG S. Rolle: R06F10A
3040 Biddle Road
Medford, OR 97504

Rogue River & Siskiyou
National Forest

Medford District Office

To: Vincent Vukelich

Fax: (202) 273-3559

RE: FACA REGULATIONS

Attached are some comments.
Thanks for the chance to give input.

Correspondence Profile Sheet

Office of Governmentwide Policy (M)
(202) 501-8880

7/15
→ VV

CONTROL#: M97-006

DATE OF CORRESPONDENCE: July 2, 1997

DATE RECEIVED BY OGP: 7/14/97 12:46:21 PM

DUE DATE:

TO: G. Martin Wagner

FROM: James M. Souby
Western Governors' Association

SUBJECT SUMMARY: The Western Governors' Association adopted WGA Policy Resolution 97-014 *Federal Advisory Committee Act* (copy attached) at the association's Annual Meeting in Medora, North Dakota on June 24, 1997. WGA policy resolutions express the governors' collective position on significant issues and require a two-thirds vote of the governors for adoption.

INFORMATION COPIES: Marty Wagner (M)
John Sindelar (M)
MV

CONCURRENCES:

ACTION OFFICER: James (Jim) Dean
Deputy Associate Administrator
Committee Management Secretariat Staff

ACTION REQUIRED:

CFSAN

Facsimile Transmission from the
Special Assistant for Advisory Committees
Office of Policy, Planning & Strategic Initiatives
Center for Food Safety and Applied Nutrition
Food and Drug Administration, Washington, DC

TO: Mr. Vince Vukelich, GSA, Committee Mgmt. Secretariat

Voice phone number: 202-273-3558
Facsimile phone number: 202-273-3559

Number of pages (including coversheet): 3

Date: 8/26/97

FROM: Lynn A. Larsen, Ph.D.
Mail Code: HFS-5
200 C St. SW, Washington, DC 20204
Voice phone number: (202) 205-4727
Facsimile phone number: (202) 401-2893 or (202) 205-4970

Message:

See attached.

NIH COMMITTEE MANAGEMENT OFFICE
Building 31, Room 3B55

TO: Mr. Vincent Vukelich
PHONE NUMBER: 202-273-3558

FROM: Ms. LaVerne Stringfield
PHONE NUMBER: 496-2123

DATE SENT: July 21, 1997
NUMBER OF PAGES (INCLUDING COVER SHEET): 11

MACHINE NUMBER OF ADDRESSEE: 202-273-3559
MACHINE NUMBER OF SENDER: 402-1567
PERSON SENDING FAX: Anna Snouffer

COMMENTS: Please call 496-2123 to acknowledge receipt.

Remarks: As Discussed.

fax

Minerals Management Service
949 E. 36th Avenue, Room 308
Anchorage, Alaska 99508-4363

FAX # (907) 271-6805

TO: Vincent Vukelich

FROM: Christine Huffaker

Date Sent:	/ Time:	# of pages (includes cover):
7/8/97	1:50p ADT	2

FAX TRANSMITTAL COVER SHEET

Date: July 10, 1997

To: Committee Management Secretariat
General Services Administration
Attention: FACA Regulations

Fax: 202-273-3559
Phone: 202-273-3558

From: Betsy Rieke
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University of Colorado School of Law
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TOTAL PAGES (INCLUDING COVER SHEET): 11

The Federal Advisory Committee Act at the Crossroads

Needed Improvements in the Regulation of Federal Advisory Committees

Eric R. Glitzenstein

Patti A. Goldman

of

Public Citizen Litigation Group

October 1989

Public Citizen

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About the Authors

Eric R. Glitzenstein has been an attorney with Public Citizen Litigation Group since 1982. He has litigated numerous cases under the Federal Advisory Committee Act, lectured on the Act, and served on the Federal Bar Association's Select Committee on FACA. He has also litigated under and written and lectured on other open government laws.

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Public Citizen Litigation Group is one component of Public Citizen, a public interest organization founded by Ralph Nader in 1971. The Litigation Group brings lawsuits to ensure government accountability, to open government processes to public scrutiny, and to promote public health and safety, competition in the professions, and union democracy. Public Citizen is a nonprofit, tax-exempt organization that is supported principally by individual contributions.

To obtain additional copies of The Federal Advisory Committee Act at the Crossroads, write to:

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INTRODUCTION

During the last decade, federal advisory committees have become an extraordinarily important part of government decisionmaking in both the domestic and foreign policy spheres. Indeed, it sometimes seems that the executive and legislative branches are no longer willing or able to tackle ***any*** significant public policy problem without calling on the services of an advisory committee. Hence, in the last several years alone, high-level, "blue-ribbon" commissions have been charged with preparing recommendations on subjects as diverse as ethics in government, pay raises for members of Congress and federal judges, acid rain, apartheid in South Africa, the Iran-contra affair, pornography, the MX missile, the Challenger disaster, the Strategic Defense Initiative, the federal budget deficit, food and drug safety, and the AIDS epidemic. In creating many of these committees, federal officials appear to have adopted the approach to governance once suggested by a British poet:

> If you're pestered by critics and hounded by faction
> To take some precipitate, positive action
> The proper procedure, to take my advice, is
> Appoint a commission and stave off the crisis.

Geoffrey Parsons, "Royal Commission," *Punch* (August 24, 1955).

While high-profile presidential commissions invariably draw the attention of the press and the public, there are hundreds of other committees that generally go unnoticed, but may be as or even more vital to the day-to-day functioning of the executive branch. According to the President's Seventeenth Annual Report on Federal Advisory Committees, during fiscal year 1988 alone:

> 58 Federal departments and agencies sponsored 1,020 advisory committees, a 17.3 percent increase compared with the number of groups in existence during Fiscal year 1987. A total of 21,236 individuals served as committee members; 3,516 meetings were held; and 996 reports were issued.

President's Seventeenth Annual Report on Federal Advisory Committees, at 2 (Fiscal Year 1988) ("President's FACA Report"). GSA has estimated that during fiscal year 1989, approximately $110 million was spent to support the activities of advisory committees throughout the government. *Id.* at 9.

Reflecting the varied programs and missions of their sponsoring agencies, "advisory committees provided advice and recommendations on issues ranging from national security concerns to specific fiscal, social, and technical issues." President's FACA Report at 2. Many of these committees exert enormous influence on government policy and decisionmaking. For example, the more than 200 peer review committees operated by agencies such as the National Science Foundation, the National Institutes of Health, and the National Endowment for the Arts largely determine which scientific and artistic endeavors the government will fund and, in turn, play a key role in shaping our nation's scientific and artistic policies and priorities. *Id.* at 2, 8-9. Likewise, the Environmental Protection Agency's Scientific Advisory Panel ("SAP") and Science Advisory Board ("SAB") — both of which are chartered as advisory committees — have statutorily mandated responsibilities to review a host of crucial decisions made by EPA, including:

- which pesticides to allow on the market and other determinations relating to pesticides that EPA must make under the Federal Insecticide, Fungicide, and Rodenticide Act;

- all standards, limitations, and regulations that are proposed by EPA under the Clean Air Act;

- all standards, limitations, and regulations that are proposed by EPA under the Federal Water Pollution Control Act and the Toxic Substances Control Act; and

- the adequacy and scientific basis of decisions made by EPA in implementing the Superfund legislation.

See Advisory Committee Charter, EPA's Scientific Advisory Panel (filed with Congress, Jan. 27, 1989); Advisory Committee Charter, EPA's Science Advisory Board (filed with Congress, Nov. 6, 1987).

In reviewing these and other decisions, the SAP and SAB have had tremendous influence on public health and environmental policy, as illustrated by the recent controversy surrounding the pesticide Alar, which is used primarily on apples. After more than five years of study, EPA had concluded that Alar is a "known animal" and "probable human" carcinogen, and in 1984-85, it initiated proceedings to cancel the registration of Alar for food uses. *See* 49 Fed. Reg. 29136 (1984). When it reviewed this decision, however, the SAP claimed there were flaws in the scientific studies and advised that additional data be obtained. *See* SAP Review of Scientific Issues in Connection with the Special Review of Daminozide (Oct. 4, 1985). Based entirely on the Scientific Advisory Panel's review, EPA reversed its course and delayed cancellation proceedings until Uniroyal Chemical Company, Alar's manufacturer, could submit additional data on the health effects of the pesticide. EPA Press Release (Jan. 22, 1986).

Given the tremendous power and influence that advisory committees wield in our government, it is essential that they function in a manner that is accessible and accountable to the public and the Congress. In enacting the Federal Advisory Committee Act in 1972, Congress recognized that advisory committees can be "a useful and beneficial means of furnishing expert advice, ideas, and diverse opinions to the Federal Government . . .." 5 U.S.C. App. II § 2(a). At the same time, Congress realized that, if advisory committees are permitted to function in a biased and secretive way, then the advisory committee process can become hazardous to the health of a democracy. Instead of being used to educate the public and its officials about a problem, they can become a device for defrauding the public into believing that a problem is being solved when it is not or, just as dangerous, into believing that neutral, expert recommendations are being developed when, in reality, the advice is predetermined by a stacked membership.

One of Congress's most basic concerns, as articulated by United States District Court Judge Thomas Jackson, was "with a pernicious species of so-called 'advisory' bodies: those dominated by industry leaders and the like with substantial parochial interest in the outcome of the matter under discussion, usually some onerous regulation or policy proposal." *Natural Resources Defense Council v. Herrington*, 637 F. Supp. 116, 120 (D.D.C. 1986). Senator Charles Percy, one of FACA's original sponsors, summarized the dangers associated with committees dominated by representatives of the regulated industry:

> Viewed in its worst light, the federal advisory committee can be a convenient nesting place for special interests seeking to change or preserve a policy for their own ends. Such committees, stacked with giants in their respective fields, can overwhelm a federal decision maker, or at least make him wary of upsetting the status quo.

118 Cong. Rec. 30276 (1972).

Recent advisory committee abuses confirm that Congress's fear of industry-controlled committees was well-placed. Examples of abuses that have recently come to light include:

- Seven of the eight members of EPA's **Scientific Advisory Panel** charged with reviewing pesticides issues, including the Alar decision, were consultants for the chemical industry, including companies that produce pesticides. At least one member of the **Science Advisory Board** has disclosed that he actually did consulting work for the chemical industry on the very substances he reviewed for EPA. *See* 245 *Science* 20, 21 (July 7, 1989); Minutes of Meeting of Scientific Advisory Panel Under Safe Drinking and Toxic Enforcement Act, at 150-55 (Jan. 29, 1988);

- The **National Advisory Committee on Microbiological Criteria for Foods** was established by the United States Department of Agriculture in 1987 to develop federal regulatory policy regarding the contamination of foods by microbiological agents, including salmonella, listeria, botulism and other bacteria. As originally constituted, every one of the ten non-governmental members of the Committee was an employee, contractor, or consultant of the food industry. In recent months, several additional members have been appointed to the Committee, yet it continues to be dominated by the food industry.

- The **Motor Vehicle Safety Research Advisory Committee** was established in 1987 by the National Highway Traffic Safety Administration ("NHTSA") as an "influential body that will help . . . formulate the motor vehicle safety research agenda for the next decade." NHTSA Press Release (Nov. 13, 1987). It is heavily represented by employees and others with financial ties to the automobile industry, yet contains virtually no representatives of consumers. This followed an earlier effort by NHTSA to create, entirely outside of FACA's coverage, an industry-dominated committee on the ability of automobiles to withstand side collisions, which was terminated as a result of a settlement agreement. *See Claybrook v. NHTSA*, Civ. No. 83-1720 (D.D.C.).

While Congress certainly had laudable objectives in enacting FACA, and while the Act has in fact accomplished some of its purposes, experience with the law has demonstrated that it is deeply flawed in several crucial respects. As Senator John Glenn, the Chairman of the Senate Governmental Affairs Committee, observed earlier this year in the course of proposing amendments to FACA:

> There is still, even after 16 years, considerable confusion concerning the interpretation of the most fundamental provisions of the Act. I am disturbed to find continued litigation over basic questions such as whether a specific group is an advisory committee as defined in the Act or whether the group meets the Act's balanced representation requirement. Over the years, portions of the Act have been criticized by several Federal court judges called upon to interpret its provisions and Congress' legislative intent.

135 Cong. Rec. S1670 (Feb. 23, 1989).

In the 100th Congress, the Senate Governmental Affairs Committee held two oversight hearings regarding FACA, one focusing on the President's AIDS Commission (S. Hrg. 100-538, December 3, 1987), the other on various committees set up to advise the Department of Defense on the Strategic Defense Initiative (S. Hrg. 100-681, April 19, 1988). As a result of these hearings, a clear consensus has emerged that certain aspects of FACA are in dire need of clarification and strengthening. As Senator Glenn has noted, virtually everyone who has focused on the statute — including federal agency officials, representatives of public interest groups, federal judges, the Administrative Conference of the United States, and the Federal Bar Association's Select Committee on FACA — agrees that "the main areas of concern" involve

- the definition of balanced membership;
- the definition of advisory committee;
- the openness of meetings and availability of documents; and
- the need to ensure that members of advisory committees do not have conflicts of interest.

135 Cong. Rec. at S1670.

In addition to the near-unanimity regarding the problems with the statute as it is currently drafted, there is also widespread agreement regarding many of the solutions to those problems. For example, in recent months, both the Administrative Conference of the United States and the Federal Bar Association's Select Committee on FACA (which is composed largely of federal agency employees who supervise compliance with the Act) have recommended that Congress require all prospective advisory committee members to fill out simplified conflict of interest forms. Likewise, both federal officials and public interest organizations agree that more meaningful and descriptive standards should be incorporated into FACA's balanced representation provisions, although there are differing views regarding the specific content of such standards.

As a consequence of this evolving consensus, as well as the intense congressional scrutiny of various advisory committees during the last several years, there now exists unprecedented momentum to strengthen and clarify the Act. The purpose of this paper is to further that process by:

(1) describing the problems that remain to be resolved;

(2) pinpointing the areas of agreement and disagreement with respect to those problems; and

(3) offering specific legislative solutions that would accommodate the concerns and views of both public interest organizations and federal agencies.

We do not intend this paper to be an exhaustive analysis of every feature of FACA that warrants revision. In particular, we will not repeat and discuss the many useful changes that are embodied

in S. 444, which was introduced by Senator Glenn on February 23, 1989. [1] Rather, we will focus on the three core defects in FACA that are not, in our view, adequately addressed by current legislative proposals:

(1) **Inadequate requirements for the reporting of conflicts of interests by advisory committee members;**

(2) **Confusion concerning the meaning of FACA's balanced representation requirements and the inability of courts to discern and apply meaningful standards of fair balance; and**

(3) **Confusion concerning the threshold coverage of the Act, particularly with regard to committees that are being "utilized" but have not been formally established by the government.**

Each of these problems is not only significant in its own right, but, in combination, they make it virtually impossible for members of the public and the courts to guard against the kind of abuse of the advisory committee process that FACA was fundamentally intended to eliminate — *i.e.*, the domination of committees by representatives of industry, who are thereby afforded a special opportunity to influence federal policy on matters in which they have a vested economic interest but which are also of vital concern to the public.

[1] Appendix B summarizes Public Citizen's position with regard to aspects of S. 444 that are not discussed in this report. In addition, Appendix B sets forth the proposed provisions which we explain in detail in the report.

SUMMARY

A. *Conflicts Of Interests*

There are two fundamental, related problems with existing efforts to regulate conflicts of interests by advisory committee members. First, in the absence of clear guidance in FACA itself, government agencies have adopted a schizophrenic approach to conflict of interest reporting requirements for advisory committee members. Thus, some advisory committee members, who are designated special government employees by their appointing agencies, must fill out burdensome, voluminous conflict of interest forms, while other members, who are not so designated, have no reporting obligations at all.

There is now general agreement that this dual system should be replaced by a requirement for abbreviated, simplified conflict of interest reporting requirements for all advisory committee members. The purpose of the reporting requirement would not be to prohibit all individuals with potential conflicts from serving on committees but, rather, to ensure that the government and the public are at least aware of such conflicts and can therefore effectively appraise the value of any recommendations that the committee develops. Thus, both the Administrative Conference of the United States and the Federal Bar Association's Select Committee on FACA have recommended that all advisory committee members should be required to fill out forms that indicate only those employment, financial, and other interests that are directly germane to service on the committee.

There is also widespread agreement among agencies and public interest groups that narrowly and sensibly drafted forms would not deter service on advisory committees but would provide the government and the public with vital information. For example, a person designated as an industry representative should obviously not be obligated to detail his employment history with the industry, but he should be required to indicate his current employer and whether he has significant stock holdings or other personal financial interests that might be directly affected by the matter under scrutiny. Similarly, if a committee appointee is designated as an academic representative, but routinely does substantial consulting work for the industry, that fact should be reported.

The second, related issue is whether these abbreviated conflict of interest forms should be made available to the public. If members of the public do not have such access, their ability to determine whether a particular committee is fairly balanced or to challenge a specific recommendation as being the product of a biased advisory process is effectively nullified. For example, the Environmental Protection Agency has refused to inform the public whether members of the SAP and SAB are consultants or contractors of the chemicals industry, although such ties have been disclosed by Senators Joseph Lieberman and Harry Reid and the government recently conceded in a brief filed in federal court that "a 'substantial percentage' of the consulting work of SAP members is in fact related to petrochemical or pesticide industries." Gov't Brief at 20 in *Meyerhoff v. EPA*, No C 89-1433 (N.D. Cal. filed Oct 11, 1989). As these Senators have recognized, the public plainly has a right to know whether advisory committee members who are influencing public health policy have financial conflicts that may affect their recommendations.

On the other hand, as ACUS has concluded, if an abbreviated, carefully crafted conflict-of-interest form is used, which requires only reporting of information that is directly relevant to service on a particular committee and does not require reporting of specific amounts of financial holdings,

there is no reason to believe that its disclosure would generally deter people from serving on committees. In fact, the only persons who might be deterred from such service would be those who do in fact have conflicts that they are not willing to reveal to the American public. Preventing those few individuals from serving on public advisory committees would be consistent with, not contrary to, FACA's purposes.

B. *Balanced Representation*

FACA requires that all federal advisory committees must be "fairly balanced in terms of the points of view represented and the functions to be performed . . .." 5 U.S.C. App. II § 5(b)(2). However, never in the last seventeen years has a federal court altered the composition of an advisory committee, and only once in that period has a court issued any relief at all under the balanced representation provision. This is not because all advisory committees have been "fairly balanced" since FACA was enacted. Rather, the courts have, in effect, found the statutory standard to be too vague and confusing for effective judicial supervision.

Indeed, in a case decided several weeks ago involving a challenge to the composition of USDA's Microbiological Committee, a three-judge panel of the D.C. Circuit split three different ways on the meaning and application of FACA's balanced representation provision — with one judge finding that the provision contains absolutely no meaningful, judicially enforceable standards, one judge ruling that the Microbiological Committee can be regarded as "fairly balanced" in spite of its domination by industry and absence of consumer representation, and one judge concluding that the Committee was illegally constituted because of the domination by industry and absence of consumer representation. *See Public Citizen v. National Advisory Committee on Microbiological Criteria for Foods*, No. 88-5352 (D.C. Cir. Sept. 26, 1989). In view of this confusion in the courts, and the concomitant lack of coherent guidance flowing to those who must implement FACA, it is incumbent on Congress to strengthen and clarify the Act's balanced representation provision.

Without an enforceable balanced representation requirement, the public and the courts are powerless to prevent advisory committees from being used to rubber-stamp the views of the appointing authority or, of paramount concern to the public, from being manipulated by the regulated industry to control or weaken public health, safety, and environmental policy. The Microbiological Committee, for example, was stacked by the Department of Agriculture with ten representatives and associates of the food industry, yet USDA could not make room for even a single representative of consumers. The work of the Committee is of grave concern to consumers because microbiological contaminants such as salmonella and botulism cause over 7,000 deaths and 6,000,000 illnesses each year. Even so, USDA has argued that the one-sided composition of the Committee does not violate FACA's balanced representation requirement, and this position has been sustained by the courts.

The challenge in drafting a balanced representation requirement is to devise a provision that has objective, enforceable standards, yet affords agencies sufficient flexibility to select members for a wide variety of committees. After studying the matter for a number of years, we believe that the only effective solution is a provision that delineates basic categories of interests that must be represented on committees, unless the agency makes a specific finding that these interests are not germane to the work of the Committee. Thus, agencies should generally be required to include on public policy committees at least some representatives of both industry groups and public interest organizations that may be affected by the committees' recommendations. In the absence

of such a requirement, FACA's balanced representation provision will continue to amount to little more than empty rhetoric.

C. *The Threshold Coverage of FACA*

In its first and only decision construing FACA, the Supreme Court held, on June 21, 1989, that the American Bar Association's Standing Committee on the Federal Judiciary is not being "utilized" as an advisory committee within the meaning of section 3(2) of FACA when it provides the Justice Department with recommendations regarding potential nominees to the federal bench. While the Court's decision was greatly influenced by the unique constitutional concerns that arise in the context of the nomination process, it is written in such broad and open-ended terms that the coverage of virtually all committees that are "utilized" but not directly established by the government has been thrown into jeopardy.

The Justice Department is already arguing that advisory committees that have nothing to do with nominations should nonetheless, under the Supreme Court's ruling, be excluded from FACA's coverage so long as they were not directly established by a federal entity. Under this analysis, for example, if the Federal Trade Commission decided to use an existing tobacco industry committee to obtain recommendations regarding warnings on cigarettes, such an advisory relationship would not be covered by FACA. Or, if the EPA decided to routinely solicit recommendations on the health effects of pesticides from a private committee composed exclusively of pesticide manufacturers, that advisory relationship, according to the Justice Department, would not be subject to any of FACA's safeguards or protections. In short, the Supreme Court's ruling threatens FACA's coverage of precisely the kinds of advisory bodies that FACA was intended to regulate, *i.e.*, industry committees that come to be heavily relied on by federal agencies in the course of formulating public policy.

Fortunately, there is a ready-made solution to this problem. Both federal advisory committee officers and representatives of public interest groups agree on a reasonable, practical definition of "utilized committees" that should be adopted by Congress. Since 1983, the General Services Administration has issued guidance that defines "utilized" advisory committees in terms of the *functions* they actually perform, rather than the circumstances surrounding their creation. In essence, under GSA's approach, if a privately established committee is being used "in the same manner" as a committee created by the government, it should be held accountable to the public through compliance with FACA's provisions. *See* 41 C.F.R. § 101-6.1003 (1988). This definition of "utilized" committees is sensible and flexible, and should be incorporated into FACA, with an exception made for committees that are involved in the nomination process.

I. CONFLICT OF INTEREST REPORTING REQUIREMENTS

In theory, advisory committees are established to obtain neutral outside advice on a matter of particular importance. Some advisory committees are charged with reviewing an especially controversial issue, such as acid rain, pornography, or AIDS. In those cases, government decisionmakers often point to the supposedly neutral, expert recommendations of such bodies as justification for the actions that they subsequently decide to take. Other advisory committees are established to investigate a particular incident, such as the Challenger disaster or the Pan Am 103 crash, and to decide where responsibility for the tragedy lies. Again, the perception that the committee is neutral is essential to its effectiveness.

The most institutionalized, longstanding advisory committees engage in peer review of grant proposals or expert analysis of scientific evidence that is the predicate for agency actions. These committees wield tremendous power in making decisions that directly affect whether an individual or institution will receive funds or whether a certain product will be allowed on the market and under what conditions. With respect to each of these advisory bodies, conflicts of interest in general, and industry domination in particular, serve to undercut the committee's neutrality and lessen the weight that should be accorded its recommendations.

There are, of course, many instances in which "conflicts of interest," as they are traditionally defined, are a useful rather than harmful attribute of an advisory committee. In those instances, agency officials may want the industry viewpoint represented on a committee, and thus they will intentionally and legitimately select members who have an industry perspective and often an economic stake in the matter under review. Indeed, as we suggest in the second section of this report on balanced representation, advisory committees generally should have some representation of affected groups, including the affected industry. Just as clearly, however, it is widely recognized that committee members should not be packaged as neutral arbiters when, in fact, they have economic or other interests that may be affected by the committee's work. It is also widely accepted that reporting of conflicts of interest can help uncover and deter any undisclosed influences on the advisory process. For example, reporting may alert the supervising agency or other members of the advisory committee to a conflict that disqualifies an adviser from participating in a particular decision.

There are three vital issues regarding conflict of interest reporting by prospective advisory committee members. The first is which advisory committee members must complete conflict of interest reporting forms. The second is precisely what information must be supplied on such forms. The final issue is the extent to which such conflict of interest forms should be made available to the public.

These three issues are closely intertwined. Thus, where the reporting forms are extremely comprehensive, and therefore relatively burdensome and intrusive, more objections are legitimately voiced to the requirement of completing them and to their public disclosure. On the other hand, these objections diminish greatly where the forms seek less detailed information about the members' financial affairs.

A. *Current Conflict of Interest Requirements*

The Federal Advisory Committee Act is silent with respect to conflict of interest reporting. Although it contains no reporting requirement, it does have two specific provisions aimed at controlling the conflicts of interest that are inherent in the advisory committee process: (1) as discussed in the second section of this report, FACA requires advisory committees to be fairly balanced in terms of the views represented and the functions to be performed; and (2) the Act forbids special interests from inappropriately influencing the advice and recommendations of an advisory committee. 5 U.S.C. App. II, §§ 5(a) & (b). However, unless the agency and the public have certain information about the backgrounds and financial interests of advisory committee members, they cannot ascertain whether the committee lacks balance or is being unduly influenced by an interested group, and thus they cannot enforce FACA's requirements.

The only reporting requirements currently in place derive from the criminal and civil conflict of interest laws. Most of these requirements apply only to those advisory committee members who are "special government employees," a term which is defined in the Ethics in Government Act as "an officer or employee of the executive . . . branch . . . who is retained, designated, appointed, or employed to perform, with or without compensation, . . . temporary duties either on a full-time or intermittent basis" for a period of 130 days or less during a 365 day period. 18 U.S.C. § 202(a).

There is a further distinction between those special government employees who work more than 60 days in a year, which includes very few advisory committee members, and those who work 60 days or less per year. Only the longer tenured special government employees are subject to the full range of prohibitions and disclosure requirements that apply to other full-time executive branch officers and employees. (The specific restrictions contained in the Ethics in Government Act, as well as those prescribed in executive orders, are described in Appendix C.)

In recognition that neither the government nor the public can identify and police violations of these ethical standards without access to basic conflict of interest information about employees, both the Ethics in Government Act and the executive orders authorize conflict of interest reporting for advisory committee members covered by the ethical standards. The Ethics in Government Act requires mandatory reporting only for those employees who are subject to the whole range of criminal penalties. Such employees must submit extremely comprehensive reports, which call for disclosure of the source, type, and amount of virtually all income and assets, and which are required to be made available to the public. *See* 5 U.S.C. App. 4, §§ 201-207. Since few advisory committee members are employed for long enough periods of time (more than 60 days per year) to be subject to the full range of criminal penalties, few are subject to these extensive reporting requirements.

Under the Ethics in Government Act, the President may also require special government employees who work 60 days or less per year to file conflict of interest reports. *See* 5 U.S.C. App. 4, § 207. Under the executive orders on ethical conduct, such reporting is mandatory. Exec. Order No. 11,222, § 306; *see also* Exec. Order No. 12,565, § 403; Exec. Order No. 12,674, § 201(d). Such reports must list all non-federal entities in which the adviser serves as an employee, officer, owner, director, trustee, adviser, or consultant, as well as financial information that is relevant to the duties to be performed. Exec. Order No. 11,222, § 306. However, in practice, agencies require the submission of varying amounts of information, with some agencies imposing more extensive reporting requirements than called for by the executive order.

Neither the Ethics in Government Act nor the executive orders provide guidance for determining whether a particular advisory committee member is a special government employee. Since the term is defined as an employee of the executive branch who is retained, designated, appointed, or employed to perform temporary duties on a full-time or intermittent basis with or without compensation, it could conceivably include all advisory committee members. However, the executive branch has devised a more limited definition of the term in order to avoid subjecting representatives of outside interests to the Ethics in Government Act's conflict of interest rules.

Thus, a 1982 Office of Government Ethics memorandum subjects to the Act's requirements those advisers who are selected because of their individual qualifications, but not those who are selected to act in a representative capacity for industry, labor, the public at large, or other nongovernmental groups. *See* Memorandum to Heads of Executive Departments and Agencies from J. Jackson Walter, Director, Office of Government Ethics (July 9, 1982). An elaborate set of criteria has evolved for distinguishing "representative" advisers from individuals whose advice is obtained because of their individual qualifications. Thus, agencies have been instructed to consider such factors as whether the adviser is being paid, whether the adviser was appointed on the recommendation of an outside organization, whether the adviser is an independent contractor, whether the adviser has the authority to bind an outside organization, and whether the individual is acting as a spokesperson for the United States. *Id.*

Rather than following this intricate system for determining whether advisory committee members are special government employees, agencies tend to adopt rules of administrative convenience which lump all of their advisers into one category or another regardless of how the Office of Government Ethics standards apply to them. Thus, the Department of Health and Human Services, which has more advisory committees than any other agency, routinely appoints all advisory committee members as special government employees, subject to ethics laws and conflict of interest reporting requirements. The Department of Education, NASA, the United States Information Agency, and the Nuclear Regulatory Commission likewise designate all of their advisory committee members as special government employees. In contrast, the Department of Transportation considers its advisory committee members to be "representative" advisers outside the scope of the ethics and reporting requirements. Other agencies, including the Departments of Energy and Treasury, follow a similar policy, presumably to avoid requiring their advisers to submit onerous conflict of interest reports. *See* R. Berg, *Conflict-of-Interest Requirements for Federal Advisory Committees: Report to ACUS*, at 29-30 (May 1989).

Because many agencies have abandoned the arcane special government employees rules in favor of an approach that is easier to apply, there is a lack of consistency in how advisory committee members are treated throughout the government. In some instances, agencies are not requiring the submission of conflict of interest reports by advisers who meet the definition of special government employee, while many "representative" advisers are filing such reports. *Id.* Moreover, even where an agency concludes that an adviser is not a special government employee, the adviser is sometimes required to file a conflict of interest report because the agency wants to guard against potential conflicts of interest. *See id.* at 30 (National Endowment for the Humanities advisory committee members who review applications for grant awards are required to submit reports even though the agency classifies them as independent contractors who would not meet the definition of special government employee).

In addition, even where advisory committee members are considered special government

employees and therefore are required to file conflict of interest reports, the agencies do not release these reports to the public. In taking this position, agencies have pointed to the Ethics in Government Act and the executive orders issued by Presidents Reagan and Bush, which describe the financial disclosure reports filed by special government employees as confidential to the extent permitted by other laws. *See* 5 U.S.C. App. 4, § 207; Exec. Order No. 12,565, § 403; Exec. Order No. 12,674, § 201(d). In addition, a 1985 amendment to the Ethics in Government Act, which will be applicable to future reports filed under yet-to-be-promulgated Office of Government Ethics regulations, states that such reports shall not be disclosed to the public. 5 U.S.C. App. 4, § 207(a)(2). These authorities apply generally to the conflict of interest reports filed by special government employees. As such, they do not take into account the unique features of advisory committees, which call for and even welcome certain conflicts of interest, as long as they are controlled in accordance with FACA's balance and undue influence requirements.

The forms and the Office of Personnel Management's regulations give the agencies discretion to release conflict of interest forms to the public by providing that "[a]n agency may not disclose information from a statement except as OPM or the agency head may determine for good cause shown." 5 C.F.R. § 735.410. Presumably, agencies could find good cause to release certain information about advisory committee members. However, they have generally refused to do so.

Indeed, both the Department of Health and Human Services and the Environmental Protection Agency have refused to disclose these reports in lawsuits brought under the Freedom of Information and Federal Advisory Committee Acts. In the HHS case, which has been in litigation since 1980, the agency's claim that release of the forms would constitute an unwarranted invasion of privacy has been rejected because of the cursory nature of the information provided, the availability of this type of information from public sources, and the public's "singularly strong interest in disclosure of consultants' conflicts of interest." Wa*shington Post Co. v. Department of Health & Human Services*, 690 F.2d 252, 264 (D.C. Cir. 1982). As a result of this decision, the agency has released the advisers' employment information, but it has continued to assert that release of their financial interests would impair the government's ability to collect such information in the future. Despite several rounds of litigation, the government has yet to introduce sufficient evidence to prove this claim. *See Washington Post Co. v. Department of Health & Human Services*, 865 F.2d 320 (D.C. Cir. 1989). EPA is lodging similar arguments in *Meyerhoff v. EPA*, No. C89-1433, which is pending in the United States District Court for the Northern District of California.

The current rules have been criticized for their complexity, which in turn has led to widespread noncompliance by agencies. In their place, many agencies require either all or none of their advisers to file reports, which are both considered unsatisfactory systems. In addition, there is a perception that the reports required by many agencies are more burdensome and intrusive than is necessary. As a result, both the Federal Bar Association's Select Committee on FACA, which is composed largely of agency advisory committee officers, and ACUS, which is made up primarily of current and former government officials, have recommended a uniform reporting requirement, under which all advisory committee members would be required to file simplified reports that would be released to the public. *See* FBA Letters to Senator John Glenn (April 6 and April 25, 1989) (included in Appendix D); 54 Fed. Reg. 28964, 28969-70 (July 10, 1989). President Bush's Commission on Federal Ethics Law Reform has also supported uniform conflict of interest reporting by advisory committee members and the use of a simplified reporting form for such purposes, although it backtracked from its preliminary support for public disclosure of such reports. Report of President's Commission on Federal Ethics Law Reform at 30-31 (March 1989).

B. *Approach Taken in S. 444*

In contrast, Senate Bill 444 perpetuates the distinction between advisory committee members who are appointed as federal employees and those who are appointed to represent non-federal interests. S. 444, §§ 6(4); 7(3)(6)(a)(4) & (7)(a)(7). It requires only those advisory committee members who are considered federal employees to disclose in writing any financial or other interest which may be affected by the work of the committee or create an appearance of a conflict of interest. *Id.* §§ (9)(c)(2)(A) & (10)(c)(5)(B). The bill is silent with regard to public disclosure of those conflict of interest forms that are required to be filed, and, of course, it would result in no public disclosure of potential conflicts of interest of those advisers who are appointed to represent non-federal interests.

Aside from establishing this reporting obligation for advisers who are federal employees, the bill adds a requirement that a designated official be required to counsel advisory committee members on federal ethics rules, criminal conflict of interest statutes, and any possible ethical problems that may arise from serving on the advisory committee. S. 444, §§ (7)(3)(7)(a)(7) & (9)(c)(2)(A) & (10)(c)(5)(B).

1. *S. 444's Counseling Requirement*

S. 444's counseling requirement would be a useful reform. It would ensure that advisory committee members would be provided with critical information about their conflict of interest obligations. By making such counseling mandatory, the bill would obviate the need for advisory committee members to seek out such information, which many advisers may not do because of the effort involved, ignorance of the need for such guidance, or a concern that such inquiry will cause suspicions about the individual's ability to serve as an impartial adviser.

Two recent controversies involving former members of EPA's Scientific Advisory Panel demonstrate the need for an institutionalized method of informing advisory committee members of their obligations under conflict of interest laws. One Panel member, Christopher Wilkinson, participated in the Panel's 1985 review of the scientific evidence of the carcinogenic risks of Alar, a cosmetic pesticide used on apples. In 1987, five months after he left the Panel, Dr. Wilkinson served as a paid consultant for Uniroyal Chemical Co., the maker of Alar. In this capacity, he reviewed animal studies on Alar, criticized them as flawed, and advocated Uniroyal's position in a meeting with EPA. 245 *Science* 20, 21 (July 7, 1989); 13 Chemical Regulation Reporter (BNA) 195-96 (May 19, 1989). After the incident became a subject of a congressional hearing and gained media attention, Dr. Wilkinson stated that Scientific Advisory Panel members were never told that they could not consult for chemical companies after leaving the Panel. *Id.*

Another Panel member, Wendell Kilgore, served as an expert witness for an entity seeking an exemption from EPA's ban on the fungicide Dinoseb, which Dr. Kilgore had reviewed as a member of EPA's Scientific Advisory Panel. After the EPA investigated the incident for violations of the ethics laws, and referred the matter for prosecution, Dr. Kilgore claimed that he was amazed at the potential consequences of his actions, stating "I would have followed the rules had I known them." 245 *Science* 20, 21 (July 7, 1989).

In the wake of these two incidents, members of other EPA advisory committees have also charged that they received inadequate guidance from EPA about their ethical obligations. As a

result, they have urged EPA to provide clearer information in the future. 13 Chemical Regulation Reporter (BNA) 564-66 (July 21, 1989).

S. 444's counseling requirement would help avoid these problems. However, unless this requirement is coupled with conflict of interest reporting by all advisory committee members, counseling cannot begin to solve many of the problems with the current system. Under the bill, agencies would be required to counsel all advisory committee members, but they would receive conflict of interest information from only those members who are considered special government employees. Without such information for "representative" advisers, agencies will be unable to determine the full range of such advisers' ethical obligations. For example, while industry representatives are not foreclosed from participating in deliberations affecting their industry generally, they may be advised to recuse themselves from deciding whether a product of a company for which they work will be licensed.

2. *S. 444's Reporting Requirement*

S. 444's reporting provisions solve few, if any, of the problems in the current reporting scheme. S. 444 would continue to require that only one segment of advisory committee members file conflict of interest reports. While it is written in terms that may allow simplified reporting for those members, it makes no provision for the public to gain access to information about conflicts of interest or industry ties of advisory committee members.

a. *Conflict of Interest Reporting Should Not Be Tied to an Adviser's Status as a Special Government Employee.*

There is little, if any, reason to link the obligation to file conflict of interest reports to whether an adviser is appointed because of his or her qualifications or to represent a non-federal interest. While this distinction may be relevant in determining whether the adviser is subject to criminal and civil standards of ethical conduct, it does not determine whether the agency and the public need information about the adviser's background.

All advisory committee members should file conflict of interest reports because all advisory committees are subject to FACA's balanced membership requirement and its ban on inappropriate influence by special interests. Without routine reporting of advisers' employment ties and financial interests, neither the agency nor the public can evaluate whether the committee is balanced or unduly influenced by a special interest. Moreover, they cannot ascertain whether an individual who is designated as a representative of one perspective in fact has economic ties to another interest.

President Bush's Commission on Federal Ethics Law Reform recently recommended that all advisory committee members be required to file conflict of interest reports. Report of President's Commission on Federal Ethics Law Reform (March 1989). In doing so, the Commission concluded that FACA's balance and undue influence provisions can assure the integrity of advisory committee deliberations in place of criminal laws, but that their effectiveness "depends on the availability of information about the financial holdings of advisory committee members." Id.

The importance of across-the-board reporting is demonstrated by several examples. Thus, the EPA appoints numerous "academics" to its Scientific Advisory Panel, which reviews the scientific evidence on which EPA bases its pesticide regulatory decisions. However, it is common for

members of academia to serve as paid consultants for industry in addition to their university work. Similarly, industry groups may fund the research of particular professors or university departments. While these financial ties may not disqualify an individual from serving on the Panel altogether, they may well preclude the individual from making recommendations on the products of the employing or funding company. In addition, if all of the Panel members had similar industry ties, it would plainly be "inappropriately influenced" by industry in violation of section 5 of FACA.

Similarly, in the case of the National Advisory Committee on Microbiological Criteria for Foods, discussed in more detail in the following section, the appointing agencies contended that only those members working directly for industry represented industry interests. However, while the principal employment of many of the members indicated an industry tie, others, such as those employed by research organizations, also had industry connections through consulting or funding arrangements. The agency, Congress, and the public need access to information about such connections in order to discern the extent to which the members have industry allegiances. Likewise, for investigative committees, such as the one looking into the Pan Am 103 crash or the Challenger disaster, it is obviously crucial for the members to disclose any and all ties to the companies under investigation, as well as to others in the same industry.

Even where an agency appoints individuals as industry or non-industry representatives, conflict of interest reporting may uncover an erroneous and misleading classification. Thus, an agency may appoint a member as a public interest representative when that individual, in reality, is an industry consultant. For example, in 1982, the Advisory Committee on Meat and Poultry Inspection had six designated industry representatives and two designated consumer representatives. However, one of the "consumer representatives" was the executive director of American Council on Science and Health, an industry support group, and the other was actively involved in family beef farms and formerly an employee of Grocery Manufacturers of America, a food industry trade association. *Public Advisers/Private Interests: A Common Cause Study of Imbalance on Federal Advisory Committees* at 27 (1984). Such mislabelling can be detected only if the adviser is required to report information about his or her employment and financial interests.

Aside from providing agencies and the public with critical information about all advisory committee members, which would facilitate compliance with FACA's mandates, a uniform conflict of interest reporting requirement would have the added benefit of making the reporting system simpler, more equitable, and more rational. It would eliminate the hopelessly complex and arcane web of rules that have been devised for distinguishing "representative" advisers from those appointed for their qualifications. A uniform reporting requirement would inject fairness into the system by mandating consistent treatment of all advisory committee members, regardless of how and whether the appointing authority applies the special government employee rules. It would also put an end to widespread agency noncompliance with those rules, which has evolved because of their complexity and inability to serve the agencies' needs.

For these reasons, ACUS, which is itself an advisory committee, has adopted a recommendation that a uniform minimal disclosure requirement be established for all advisory committee members, regardless of whether they are classified as special government employees. *See* 54 Fed. Reg. 28964, 28969 (July 10, 1989). The Federal Bar Association's Select Committee on FACA also favors subjecting all advisory committee members to a simple, uniform, and straightforward reporting requirement. *See* Letters from FBA to Senator Glenn (April 6 and April 25, 1989) (Appendix D). As mentioned above, President's Bush Ethics Commission also recommended a uniform manda-

tory reporting requirement for all advisory committee members. Ethics Commission Report at 30-31.

b. ***Reporting for Advisory Committee Members Should Be Simplified.***

The reporting obligation established under S. 444 requires disclosure in writing of financial or other interests which may be affected by the work of the committee or which may create an appearance of a conflict of interest. S. 444, §§ 9(c)(2)(A) & 10(c)(5)(B). To the extent that this language simplifies the reporting obligation for advisory committee members, it is a step in the right direction.[2]

There is no need for advisory committee members to report the full range of their financial holdings or the amounts of any of their income or financial interests. What is important for FACA compliance is simply whether the individual has ties to industry or has some other relevant interest, such as stock ownership in an affected company. Accordingly, we endorse limiting the reporting requirement to those ties and interests which may be affected by the work of the committee or which may create an appearance of a conflict of interest, as S. 444 does. In addition, the bill should make it clear that advisory committee members need not report the amounts of their income or financial interests. If the agency needs such information in order to determine whether a particular conflict called for recusal, divestiture, or withdrawal of an appointment, the agency could obtain such information in the counseling session mandated under S. 444 or in a confidential supplemental submission.

This approach is consistent with ACUS's recommendations, which would require reporting of those positions and interests (but not any dollar amounts of such interests) that are relevant to the purposes and functions of the advisory committee as determined by the agency or appointing authority. 54 Fed. Reg. at 28969. It also coincides with the position of FBA's Select Committee on FACA, which endorses reporting of employment affiliations and financial interests related to the subject of the committee's work, but not the amount of such interests. *See* Letters from FBA to Senator Glenn (April 6 and April 25, 1989) (Appendix D). And it also reflects the position taken by the Natural Resources Defense Council in its lawsuit to obtain the conflict of interest reports filed by members of two EPA scientific advisory committees. In that case, the NRDC has limited its request to the existence (but not dollar amounts) of employment ties with or financial interests in chemical companies, since those are the types of arrangements that give rise to potential conflicts of interest. *See Meyerhoff v. EPA*, *supra*.

Where an adviser's outside employment concerns a particular matter that may come before the advisory committee, it would be useful to list the subject matter of the arrangement. This would identify situations in which recusals are appropriate, or, if the adviser participates in the deliberations, it would inform the agency and the public of a potential bias that may diminish the weight that should be accorded the recommendation.

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[2] While S. 444's requirement for reporting of "any interest" presumably includes employment interests, it would be clearer if the bill expressly required disclosure of the individual's principal employment, as well as all other non-federal employment related to the advisory committee's work, since these are likely to be the most common sources of potential conflicts.

The reporting of employment interests would disclose, for example, whether a member of a pesticide advisory committee serves as a consultant to a pesticide company or user and the subject of the consultation. The employment information supplied by members of the Microbiology Committee would include any consulting work done for, or grants received from, food producers. And a member of an advisory committee that evaluates the safety and effectiveness of drugs would have to disclose any interests in patents that he or she has as a result of research and development work.

Limiting conflict of interest reports to those employment arrangements and financial interests that are germane to the work of the advisory committee would simplify financial reporting and make it less burdensome and intrusive. At the same time, it would still encompass the information that the agency and the public need to have to ensure compliance with FACA's requirements and objectives. Finally, simplified reporting of such minimal interests would facilitate public disclosure of the reports because they would contain far less private and irrelevant information than the current forms.

c. ***Simplified Conflict of Interest Reports Should be Disclosed to the Public.***

No one disputes that the public has a significant interest in discerning whether advisory committee members have conflicts of interest or whether an advisory committee is dominated by industry representatives. Indeed, the D.C. Circuit concluded that "the public has a singularly strong interest in disclosure of consultants' conflicts of interest." *Washington Post v. Department of Health & Human Services*, 690 F.2d at 264. Likewise, the Solicitor General stated in a Supreme Court brief in a Freedom of Information Act case that conflict of interest reports filed by advisory committee members have "a strong and direct connection to the public interest in ascertaining any conflicts of interest by such persons." Brief of the United States, at 16, *in Department of Justice v. Reporters Committee for Freedom of the Press*, 109 S. Ct. 1468 (1989).

While FACA prohibits undue industry influence on the advisory process, the public cannot play a role in monitoring implementation of this requirement without basic information about advisory committee members' employment, consulting work, financial interests, and other affiliations. Public access is particularly important where individuals with conflicts participate in advisory committee deliberations. For example, a Food and Drug Administration panel reviewing the use of a particular chemical in a shampoo had two members who were consultants to the shampoo company. These members participated in the deliberations and voted on the committee's recommendations. 245 *Science* at 22. Where, as in this situation, individuals with a direct interest in the matter before the committee do not recuse themselves, the public should know about the conflict in order to assess the weight to be accorded the committee's recommendations.

Another recent episode illustrates the type of information that would become available to the public through public conflict of interest reporting. Senator Joseph Lieberman recently obtained the financial disclosure forms of the members of EPA's Scientific Advisory Panel who participated in the Panel's review of Alar. That review was particularly significant because, prior to the Panel's recommendations, EPA had formally proposed to ban Alar. However, after the Panel criticized aspects of the existing evidence and called for additional studies, EPA reversed course and allowed Alar to stay on the market. Senator Lieberman revealed that, according to the conflict of interest reports, seven of the eight Panel members who reviewed Alar were consultants for the chemical industry. 245 *Science* at 20. Along the same lines, the government recently disclosed in a lawsuit

to obtain these forms that "a 'substantial percentage' of the consulting work of SAP members is in fact related to petrochemical or pesticide industries." Gov't Brief at 20, in *Meyerhoff v. EPA*, No. C 89-1433 (N.D. Cal. filed Oct. 11, 1989).The only way to ensure that such information comes to light is by requiring simplified conflict of interest forms to be made available to the public.

The State of California has adopted a practice of publicly releasing the financial disclosure forms filed by the advisory body that decides whether pesticides are carcinogens or reproductive toxins subject to a state labeling law. These forms have revealed that some members who also serve on EPA advisory committees on pesticides have been consultants to chemical companies that produce pesticides. One such individual disclosed that he has done consulting work for industry on two substances that he reviewed as a member of EPA's Science Advisory Board. *See* Minutes of Meeting of Scientific Advisory Panel Under Safe Drinking Water and Toxic Enforcement Acts, at 150-55 (Jan. 29, 1988). In other words, neither EPA's monitoring nor any self-policing by the Board or its members caused this member to recuse himself from reviewing these substances. And without disclosure of the California form, the public would never have learned about this adviser's interest in the matters he reviewed as an EPA adviser.

These examples demonstrate that the public, as well as the supervising agency, must have access to sufficient information about the industry ties of advisory committee members to be able to identify and guard against undue industry influence or an imbalance in an advisory committee's composition. Similarly, the public should be apprised if there is a split between those advisory committee members who are aligned with industry and those who are not.

Any objections to public disclosure of conflict of interest reports have generally been directed to disclosure of the type of detailed information that is contained in the most extensive financial disclosure forms. However, if the reports do not call for the amounts of income or financial interests, and if they are limited to those employment arrangements and assets that are directly germane to the advisory committee's work, they will contain far less of the personal information that has given rise to objections.

During disputes over the lack of balance on specific advisory committees, there have been extensive disclosures about the backgrounds of the committee members. For example, in lawsuits challenging the make-up of the AIDS Commission and the Microbiology Committee, the government released the resumes of the advisory committee members, which highlighted past and current employment. Moreover, such information has often been the subject of agency press releases, and is routinely available from other public sources, such as *American Men and Women of Sciences* and similar Who's Who guides for other professions. Indeed, some agencies publish biographical data and professional affiliations about nominees for advisory committee slots in the Federal Register. *See* 54 Fed. Reg. 33767 (Aug. 16, 1989) (EPA's Scientific Advisory Panel).

While such disclosures are sporadic and thus fail to provide a steady and reliable stream of information to the public, they confirm that disclosure of basic data regarding employment status and professional affiliations will not deter service on advisory committees. Indeed, in the *Washington Post* case, the Department of Health and Human Services released the employment information supplied by members of the National Cancer Institute advisory committee on grant awards, yet the government has never contended that disclosure of the information harmed NIH's ability to recruit advisers. Similarly, there is no evidence that the State of California's disclosure of the conflict of interest reports filed by its advisory committee members has caused it any difficulty

in recruiting scientists to serve on its committees.

There is a growing consensus that public disclosure of simplified conflict of interest reports is not only appropriate but essential to furtherance of FACA's objectives. In particular, ACUS supports mandatory public disclosure of all employment-related information in a simplified conflict of interest report. 54 Fed. Reg. 28969 (July 10, 1989).

The FBA's Select Committee on FACA and the Federal Advisory Committee Management Association, an organization of professional committee management officers from 60 federal agencies, have gone even further and endorsed public disclosure of simplified financial disclosure reports in their entirety. In making this recommendation, they have contrasted the simplified forms with more extensive reports currently in use, which they would oppose disclosing to the public. *See Federal Advisory Committee Amendments Act of 1988: Hearing before the Senate Committee on Governmental Affairs* at 155, 166 (Oct. 5, 1988). Thus, the FBA Committee has concluded that:

> the public interest would be served if a simple disclosure statement listing relevant affiliation and financial interests were developed. It would not ask for information as to the value of assets. Such a form should be disclosed to the public and should be required of all advisory committee appointees. This short statement would be distinct from the full disclosure form presently required of special government employees, which is not disclosed to the public.

Id. at 155; Appendix D. As the Chairperson of the FBA Committee, Brian Murphy, elaborated further in his testimony with regard to a hypothetical advisory committee dealing with steel industry policies:

> you will want a divergent spectrum of different opinions on the part of your experts, but the fact that your experts work for U.S. Steel or Bethlehem or somebody else and they have the steel industry's interests in mind is not disqualifying. What you need, of course, is disclosure .... [T]here is nothing inherently wrong with conflicts, so long as they are in the sunshine.

Id. at 34-35.

In addition, President Bush's Ethics Commission initially supported public disclosure of the much more extensive financial disclosure forms that are currently in use, although it later backtracked from that recommendation. And even Wendell Kilgore and Christopher Wilkinson, the two EPA advisers who have been investigated for violations of the criminal ethics statutes, support public disclosure of consulting arrangements as the best way to avoid problems of the sort they have encountered. 245 *Science* at 22. Thus, public reporting of potential conflicts of interest can serve to educate and deter the adviser from participating in a decision in which he or she has a vested interest or in otherwise giving the appearance of a conflict of interest, but agencies, public interest groups, and committee members generally agree that it will not significantly curtail participation on advisory committees.

In sum, there is no basis for concluding that individuals will be deterred from serving on advisory committees merely because of public disclosure of simplified reporting forms. If any such deterrence occurs, it may well advance, rather than undermine, FACA's objectives. For example, if someone designated as a public or academic representative refuses to disclose his or her industry

ties, that individual should not serve on an advisory committee in that representative capacity.

C. *Proposed Solution*

Requiring simplified conflict of interest reporting by all advisory committee members, with public disclosure of the reports, will minimize invasions of privacy, while guaranteeing that agencies and the public have sufficient information to ensure that advisory committees contain balanced memberships and are not dominated by industry. Accordingly, in addition to the counseling requirement contained in S. 444, we propose the following amendment to FACA:

All members of federal advisory committees shall file annual written reports disclosing:

(1) the individual's principal employment;

(2) all other corporations, companies, firms, partnerships, business enterprises, research organizations, educational institutions, or other entities in or to which the individual serves as an employee, officer, adviser, director, owner, or consultant, including the subject matter of the individual's service, but only to the extent the entity or relationship is or may foreseeably become relevant to the purposes and functions of the advisory committee; and

(3) the identity, but not the value or amount, of any sources of income or financial interests that are or may be relevant to the purposes and functions of the advisory committee.

The agency or appointing authority shall make the written reports filed pursuant to this Act available to the public.[3]

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[3] A sample reporting form, which incorporates these provisions, is included in Appendix E.

II. FACA'S BALANCED REPRESENTATION REQUIREMENTS MUST BE CLARIFIED AND STRENGTHENED

A. *Background of the Balanced Representation Provision*

For twenty years, Congress has recognized that the lack of balance on advisory committees can badly distort public policy making, and it has particularly criticized committees that are dominated by large corporations which have a direct economic interest in the nature of the advice being sought. For example, in 1969, Senator Lee Metcalf introduced legislation requiring that consumers, small businesses, and labor be represented on advisory committees assisting the Bureau of the Budget under the Federal Reports Act. *See* S3067, A Bill to Amend the Federal Reports Act of 1946, Cong. Rec. S31270-78 (Oct. 23, 1969), *reprinted in* Congressional Research Service, *Federal Advisory Committee Act Source Book: Legislative History, Texts, and Other Documents*, 95th Cong., 2d Sess. 116 (Comm. Print 1978) ("Source Book").

Senator Metcalf explained that this legislation was needed because "you will find neither small businessmen nor consumer representatives on the committees" and because of the "one-sided information which the Budget Bureau receives, through its arrangement with the advisory committees from big business." Source Book at 122. Likewise, the following year, the House Committee on Government Operations studied the use and abuse of advisory committees and concluded that all committees should be required to have balanced representation "because in many critical areas administrators are receiving their advice from sources which have special and limiting viewpoints." H.R. Rep. No. 91-1731, Source Book at 232.

The same sentiments are echoed in the legislative history of FACA. For example, the House Report stressed that:

> One of the great dangers in the unregulated use of advisory committees is that special interest groups may use their membership on such bodies to promote their private concerns. Testimony received at hearings before the Legal and Monetary Affairs Subcommittee pointed out the danger of allowing special interest groups to exercise undue influence upon the Government through the dominance of advisory committees which deal with matters in which they have vested interests .... [T]he lack of balanced representation of different points of view and the heavy representation of parties whose private interests could influence their [advisory committee] recommendations would be prohibited by the provisions contained in section 4 of the bill.

H.R. Rep. No. 1017, 92d Cong., 2d Sess. 6 (1972), Source Book at 2. Senate sponsors also emphasized that legislation was needed to counter "the belief that these [advisory] committees do not adequately and fairly represent the public interest [and] that they may be biased towards one point of view or interest ...." S. Rep. No. 1098, 92d Cong., 2d Sess. 4-5 (1972), Source Book at 145; *see also* Cong Rec. S14654-55 (Sept. 12, 1972), Source Book at 213 (Statement of Senator Roth) (the legislation "addresses itself to the danger of private interests exercising unfair influence on governmental decisions through membership in advisory committees").

Unfortunately, while the final version of FACA did include a balanced representation provision, it is written in far less clear and mandatory terms than the statements contained in the House and Senate reports would suggest. Thus, section 5(b) of the Act provides that

> any such legislation [establishing, or authorizing the establishment of any advisory committee] shall — . . .
>
> (2) require the membership of the advisory committee to be fairly balanced in terms of the points of view represented and the functions to be performed by the advisory committee;
>
> (3) contain appropriate provisions to assure that the advice and recommendations of the advisory committee will not be inappropriately influenced by the appointing authority or by any special interest, but will instead be the result of the advisory committee's independent judgment ....

5 U.S.C. App. II §§ 5(b)(2), (3). Section 5(c) goes on to provide that, "[t]o the extent they are applicable, the *guidelines* set out in subsection (b) shall be followed by the President, agency heads, or other Federal officials in creating an advisory committee." *Id.* at § 5(b) (emphasis added). The Act does not define what is meant by the phrase "fairly balanced," nor does it say, in plain and explicit terms, that all federal advisory committees, regardless of their origins, must have a balanced membership.

B. *Treatment of the Balanced Representation Requirement By the Justice Department and the Courts*

The vague language of section 5 has been viewed by the Justice Department as an open invitation to argue that FACA contains *no* enforceable balanced representation requirement at all — in other words, that federal agencies are free to select any membership they want, and public groups and federal judges are powerless to do anything about it no matter how one-sided the composition of the committee may be. While the courts have not been willing to declare that FACA's balanced representation requirement is completely meaningless, they have made it plain that they regard the current provision as being far too vague and subjective for effective judicial supervision. Tellingly, not once since enactment of FACA has a federal court ordered that an advisory committee's composition be altered, and only once in that period has a court issued *any* relief under the balanced representation provision.

The most sweeping contention that has been made by the Justice Department, and which is still being made to this day, is that no member of the public even has a right to sue to enforce FACA's balanced representation requirement. Thus, in *National Anti-Hunger Coalition v. Executive Committee of the President's Private Sector Survey on Cost Control*, 711 F.2d 1071 (D.C. Cir. 1983), the Justice Department maintained that persons receiving federal food benefits should not be permitted even to make a claim that the Grace Commission, which was recommending cutbacks in the food stamp and school lunch programs, was not fairly balanced because it had no representatives of the beneficiaries of those programs. The Justice Department argued that, in "enacting the 'fairly balanced' provision, Congress neither provided for a judicial remedy, nor established individual rights and benefits." *National Anti-Hunger Coalition*, *supra*, Brief of Defendants-Appellees at 33. The court of appeals did not definitively resolve the issue in that case, although it did indicate that it was "inclined to agree" that the food stamp beneficiaries could

pursue their balanced representation claim. *National Anti-Hunger Coalition*, *supra*, 711 F.2d at 1074.

In a lawsuit just decided by the D.C. Circuit, the Justice Department persisted in its contention that FACA's balanced representation provision in its current form is completely unenforceable by the courts. *Public Citizen v. National Advisory Committee on Microbiological Criteria for Foods*, No. 88-5352 (D.C. Cir. Sept. 26, 1989), involved a challenge by six consumer organizations to the composition of an advisory committee established by the United States Department of Agriculture ("USDA") for the purpose of crafting federal policy on the microbiological contamination of foods — a grave and worsening public health problem. The Microbiological Committee is dominated by representatives and associates of the food industry who have a direct financial stake in avoiding federal regulation of the food supply. In fact, while over half of the members of the Committee are employees, contractors, or consultants of the food industry, the Committee does not have a single member who works for a consumer or public health organization.

Nevertheless, the Justice Department vigorously defended the composition of the Committee in court, contending not only that it is "fairly balanced," despite the absence of any consumer representation, but also that the plaintiff consumer organizations do not even have a right to seek redress for a lack of balance in court. *National Advisory Committee on Microbiological Criteria for Foods*, *supra*, Brief for Appellees at 28. In a direct assault on the balanced representation provision drafted by Congress, the Justice Department contended that there are

> *no standards for the district court to apply* in determining whether an advisory committee is "fairly balanced." Although the FACA calls for advisory committees to have memberships "fairly balanced in terms of the points of view represented and the functions to be performed" . . . Congress has not defined "fairly balanced." Emphasizing the necessarily imprecise nature of this requirement . . . [t]he *statute is silent as to how these provisions might be enforced.*

Id. at 29 (emphasis added). The Justice Department concluded that, because of the "absence of objective legal standards for courts to apply" under the balanced representation provision as currently drafted, members of the public seeking to complain about the composition of an advisory committee — including those who may be directly affected by the work of the committee — should not even be permitted to have their day in court. *Id.* Two of the appellate judges who reviewed the case did not accept the Justice Department's sweeping non-justiciability argument, but the third member of the panel, Judge Laurence Silberman, found it persuasive:

> I cannot discern any meaningful standard that is susceptible of judicial application in the formulation "fairly balanced in terms of the points of view represented and the functions to be performed." Therefore, I believe that judicial review is unavailable . . .. I can conceive of no principled basis for a federal court to determine which among the myriad points of view deserve representation on particular advisory committees.

National Advisory Committee on Microbiological Criteria for Foods, *supra*, slip op. at 2 (Judge Silberman, concurring in the judgment).

Most judges have not gone as far as Judge Silberman in *explicitly* foreclosing all claims under FACA's balanced representation provision, as the Justice Department has urged. However, even where suits have been permitted to go forward, recent rulings are so critical of the drafting of the

"fair balance" requirement and create so many obstacles to its enforcement that the provision has, in effect, been rendered meaningless. In the Grace Commission case, for example, Judge Gerhard Gesell complained that "[n]owhere in the FACA is the meaning of the term 'balanced' explained," 557 F. Supp. 524, 528 (D.D.C. 1983), and he went on to criticize the Act in extremely strong terms:

> It is clear that Congress in passing the FACA wished to create some controls and standards governing the advisory committee process . . .. However, the statute that resulted is [an] example of unimpressive legislative drafting. It is obscure [and] imprecise . . .. If more expertise were applied to such enactments to ensure that Congress states with more precision what it intends, the rules of the game would be more sharply drawn and court involvement would be less.

Id. at 528. While decrying the lack of clarity in the statute, Judge Gesell and the Court of Appeals did discern one principle that could be applied in assessing the balance of a committee — *i.e.*, that the "'fairly balanced' requirement was designed to ensure that persons or groups *directly affected* by the work of a particular advisory committee would have some representation on the committee." *National Anti-Hunger Coalition*, *supra*, 711 F.2d at 1074 n.2 (emphasis added). In subsequently applying that standard, Judge Gesell declared that the Grace Commission, which had no representatives of poor persons dependent on federal food programs, violated FACA when it considered recommendations for programmatic cutbacks that would directly and adversely affect "those presently eligible for various types of 'hunger' benefits." *National Anti-Hunger Coalition v. President's Private Sector Survey on Cost Control*, 566 F. Supp. 1515, 1517 (D.D.C. 1983). We are aware of no other case in which a federal judge found an advisory committee to be in violation of FACA's balanced representation provision or issued any relief at all under the provision.

In cases decided since *National Anti-Hunger Coalition*, federal judges have reiterated Judge Gesell's criticism of FACA's balanced representation provision, but they have retreated from even his limited efforts to read meaningful standards into it. Thus, in *National Association of People with AIDS v. Reagan*, Civ. No. 87-2777 (D.D.C. Dec. 16, 1987), a coalition of groups representing people with AIDS, AIDS service providers, and communities at greatest risk of being infected with the virus contended that the AIDS Commission lacked balance because it had no representation of these groups and because many of its members had publicly expressed extreme viewpoints on issues such as AIDS testing and the quarantining of persons infected with the virus. In the course of rejecting this challenge, Judge Oliver Gasch forcefully criticized FACA as an "ambiguous statute motivated by commendable goals but implemented with imprecise language that requires the Court to examine obscure legislative history . . .." Slip op. at 6.

In particular, Judge Gasch lamented the "dearth of guidance from Congress" as to how to assess whether a broad-based advisory body such as the AIDS Commission is balanced. *Id.* In the absence of such guidance, Judge Gasch found, it was not sufficient for the plaintiff groups to demonstrate that their particular viewpoints were omitted from the Commission or to show that "some commissioners hold views that are contrary to the interests of AIDS patients . . .." *Id.* at 12-13. In addition, backing off the test for balance suggested in *National Anti-Hunger Coalition*, Judge Gasch ruled that even directly "affected persons or groups" — such as people with AIDS, who had an immediate and compelling interest in the work of the AIDS Commission — had no right to be "significantly represented on the Commission." *Id.* at 12.

Rather, the plaintiffs could only have any hope of prevailing, according to Judge Gasch, by demonstrating that each and every member of the Commission held views that were directly antagonistic to those of people with AIDS and the groups at greatest risk of contracting the disease — "a task," the court conceded, that "could be accomplished only with great difficulty and even then with questionable accuracy." *Id.* at 10, 12. Consequently, the court concluded that the AIDS Commission could be regarded as "fairly balanced" even if it completely omitted any representatives of people with AIDS and those groups at greatest risk of contracting the disease.

In *National Treasury Employees Union v. Reagan*, Civ. No. 88-186 (D.D.C. Feb. 25, 1988), the court came to a similar conclusion. In that case, the National Treasury Employees Union ("NTEU") challenged the composition of the President's Commission on Privatization, which had been established to recommend sweeping proposals for turning various government functions over to the private sector. Despite the fact that the Commission contained no representatives of the federal workers who would be most directly and adversely affected by the Commission's recommendations and instead was composed entirely of strong advocates of privatization, including many representatives of big business, Judge John Pratt rejected NTEU's challenge.

Finding that the "'fairly balanced' requirement of FACA embodies inherent conceptual and practical difficulties," Judge Pratt sustained the Justice Department's contention that federal employees "are not entitled as a matter of right to have a representative . . . sit on the committee," and he even expressed "severe doubts concerning plaintiff's standing to bring this suit." Slip op. at 7 n.5, 8, 9. While acknowledging that federal employees had an obvious and direct stake in the Privatization Commission's work, Judge Pratt nevertheless found that Congress did not "intend[] the 'fairly balanced' requirement to entitle every interested party or group affected to representation on" advisory committees. *Id.* at 8.

Perhaps most problematic of all, Judge Pratt expressly upheld the government's right to include *only* strong advocates of privatization on the Commission — *i.e.*, to ignore FACA's requirement for balanced viewpoints — on the grounds that the Commission's function was to determine "*which* government programs . . . are more appropriately part of the private sector," and "*not* to determine whether or not privatization in general is a good or desirable public policy." *Id.* at 9 (emphasis in original). Under this analysis, the government may effectively eliminate the requirement for balanced representation merely by defining the function of the committee in an artificially narrow fashion. As explained by the Kettering Foundation's report on FACA:

> If this approach were applied across the board, it could lead to a significant narrowing of the fair balance requirement. It would permit the President or an appointing agency to define the committee's mission in terms of the type of advice sought — for example, a Secretary of Energy who seeks the attitudes of the nuclear industry on nuclear development policy might not be required to include environmentalists on the panel.

Richard A. Wegman, *The Utilization and Management of Federal Advisory Committees*, A Report of the Charles F. Kettering Foundation, at 191 (1983).

The most recent court decision on FACA's balanced representation provision — involving the Microbiological Committee — is especially troubling because it demonstrates in compelling terms that Congress cannot look to the courts to enforce the provision in a meaningful, coherent fashion. As noted earlier, the Microbiological Committee was created to assess the risks that food-borne

diseases pose to consumers, and to determine the kind of regulatory scheme, if any, that the federal government should implement to control biological contaminants such as salmonella and botulism which, according to the Centers for Disease Control, cause over 7,000 deaths and six million illnesses each year.

Despite the overriding significance of this issue to consumers, USDA has stacked the Committee with representatives of the food industry, which has a direct economic interest in avoiding stringent federal standards for biological contaminants. Ironically, the Committee is, for all practical purposes, identical to a hypothetical case recently suggested by Senator Glenn as the classic example of a committee that is not fairly balanced — a committee established to formulate federal policy on the use of pesticides, which was dominated by representatives of industry. According to Senator Glenn:

> You would not have the whole membership on that board from manufacturing . . .. You would want the environmental concerns, you would want the manufacturing concerns, you would want the scientific people in on that, you would want a balanced membership.

Hearing Before the Committee on Governmental Affairs of the United States Senate, *Federal Advisory Committee Amendments Act of 1988*, 100th Cong., 2d Sess. 19 (Oct. 5, 1988) (statement of Senator Glenn).

In sharp conflict with Senator Glenn's view of advisory bodies, the Justice Department vigorously defended the one-sided composition of the Microbiological Committee in the courts. In the district court, the Department admitted that *every* non-governmental member of the Committee was either a direct employee of, or had done substantial contracting or consulting work for, the food industry, and that there were no direct representatives of consumers on the Committee. Nevertheless, it contended that consumer organizations could not prevail on their balanced representation claim because they had not produced specific evidence that the Committee's members, "including the seven employees of food companies or organizations, hold scientific positions or interests contrary to the interests of consumers." Defendants' Opposition to Plaintiffs' Motion for a Preliminary Injunction at 23.

The Justice Department and USDA even went so far as to argue that the *food industry employees* on the Committee could represent the interests of consumers because they are also "consumer[s] of food with a personal interest in creating microbiological criteria designed to improve food safety." *Id.* However, in a hearing before United States District Court Judge John Garrett Penn, the government's attorney implicitly conceded the obvious — that industry employees and contractors could not really be expected to represent consumer interests on the Committee:

> THE COURT: But I'm sure you'll agree that the industry representatives have a certain point of view —
>
> MR. GUTMAN: They perhaps have a certain point of view, given their employment status.
>
> THE COURT: They can't help but have that; isn't that correct?
>
> MR. GUTMAN: I will permit the Court to take judicial notice of any predisposition that these individuals may have . . ..

THE COURT: But I think it's fair to say, isn't it, that these seven members, not unlike the other members of the Committee, may have their judgments somewhat colored by their background and where they come from, and where they come from is industry; isn't that correct?

MR. GUTMAN: That's correct.

THE COURT: It doesn't mean they're evil people just because they come from industry, but obviously . . . if you're speaking of some form of food processing or some problem, their judgment . . . may be colored by the fact of cost or other matters that may also be involved . . ..

MR. GUTMAN: They may represent the views of their employees.

THE COURT: . . . [O]r of the industry . . ..

MR. GUTMAN: Or of the industry.

Transcript of September 22, 1988 hearing at 28-29.

In spite of these concessions by the government, Judge Penn rejected the consumer groups' balanced representation claim and dismissed the case. In doing so, he joined Judges Gesell, Pratt, and Gasch in expressing severe frustration with FACA's balanced representation provision:

> [T]he Court notes that while Congress passed FACA with the goal of creating some controls and standards for governance of the advisory committee process, the statute presents various obstacles to appropriate judicial interpretation . . .. This case illustrates several aspects of the difficulty of applying objective legal rules to the FACA.

708 F. Supp. at 364. As the courts had done previously, Judge Penn responded to this perceived lack of "objective legal rules" by endorsing the Justice Department's position that the consumer groups could not prevail unless they could prove the impossible — that each and every member of the Committee, including the industry representatives, will never articulate the viewpoints of consumers on the Committee.

Thus, according to Judge Penn, even an advisory committee that is ***admitted*** by the government to be controlled by industry is not unlawful unless consumers can demonstrate that particular industry representatives have "anti-regulatory sentiments" or have "acted improperly or exceeded the scope of the mandate of the Committee . . .." *Id.* at 363. Applying this analysis to Senator Glenn's hypothetical, even a pesticide committee that was completely dominated by employees of pesticides manufacturers and had no environmental or academic representation would be deemed in compliance with FACA unless it could be proven that each of the industry representatives would invariably express "anti-regulatory sentiments" with respect to each and every issue that might come before the committee at any time in the future.

On appeal, the three judges assigned to review Judge Penn's ruling were completely "divided about the correct disposition of the case," although the "result of these divergent views of the members of the panel" was rejection of the balanced representation claim. *National Advisory*

Committee on Microbiological Criteria for Foods, slip op. at 2 (per curiam). As noted earlier, Judge Silberman determined that FACA's balanced representation requirement is written in such broad terms as to be legally meaningless and thus consumer, environmental, and other public interest organization *never* have standing even to raise claims under the provision. *Id.*

Judge Daniel Friedman did not endorse Judge Silberman's analysis, but concluded that, for reasons similar to those given by Judge Penn, the plaintiffs' balanced representation claim should be rejected on the merits.[4] Thus, Judge Friedman joined the chorus of other judges who have voiced dissatisfaction with FACA's balanced representation provision:

> The Act does not require that "consumer organizations" be directly represented on the Committee. Section 5(b)(2) is a general provision requiring only that the membership of an advisory committee be "fairly balanced"; it does not specify how the "fairly balanced" membership is to be achieved in terms of either the type of representatives or their number ....

National Advisory Committee on Microbiological Criteria for Foods, slip op. at 10 (Judge Friedman, concurring in the judgment). In view of the vagueness of the balanced representation provision and the "highly technical and scientific" mission of the Committee, Judge Friedman concluded that the Committee's composition could be sustained despite the heavy involvement of industry and the absence of consumer representatives. *Id.* at 10, 15.

The final member of the panel, Judge Harry Edwards, agreed with plaintiffs with regard to both the justiciability of their claim and the ultimate question of whether the Microbiological Committee is fairly balanced. Thus, taking issue with Judge Silberman's opinion, Judge Edwards reasoned that, while the "'fairly balanced' requirement falls short of mathematical precision in application," the courts nevertheless have a sufficient basis and hence a "duty to hear and decide such cases." *National Advisory Committee on Microbiological Criteria for Foods, supra*, slip op. at 6 (Judge Edwards, concurring in part and dissenting in part).

Next, finding fault with Judge Friedman's analysis, Judge Edwards explained that the Microbiological Committee is

> *the type of committee on which Congress believed that consumer representation was important.* Congress saw a specific need for public interest representation on committees involved in issues of public concern . . .. The Committee at issue in this case is charged with recommending regulations for a broad range of food products. These decisions have health and safety implications that directly affect consumers. Recommendations regarding these regulations involve complex *policy* choices, not merely — or even primarily — technical determinations. For these reasons, especially in light of the legislative history of section 5, I disagree with Judge Friedman's opinion . . . and I conclude that *a fair balance of viewpoints cannot be achieved without representation of consumer interests* . . ..
>
> The present case . . . involves a Committee that has been charged with recommending appropriate regulation of an industry for the benefit of the public health. *This is precisely the*

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4 Judge Friedman is a member of the United States Court of Claims. He was sitting on the D.C. Circuit panel by special designation pursuant to 28 U.S.C. § 291(a).

type of situation with respect to which Congress feared industry domination and saw a need for independent consumer or other public interest representation.

Id. at 10, 11, 14 (emphasis added).

Judge Edwards also criticized Judge Penn's finding that the plaintiff consumer organizations were required, in order to demonstrate a lack of balance, to prove that each member of the committee, including the industry representatives, could not adequately represent the consumer viewpoint:

> This is the wrong standard. Congress clearly did not intend courts to inquire into the specific opinions of every committee member in order to determine if a committee is unbalanced. Rather, it accepted that a person's viewpoints could be inferred from his or her background and employment status . . ..

Id. at 12.

As the fractured ruling in the Microbiological Committee case vividly illustrates, FACA's balanced representation provision has caused chaos and confusion in the courts. In turn, federal judges have not provided, and cannot be expected to provide, agencies and the public with coherent, consistent guidance regarding the meaning and application of FACA's balanced representation provision. Indeed, it is evident that most judges regard the provision as excessively vague and subjective and, while they have stopped just short of expressly declaring the provision to be judicially unenforceable — as Judge Silberman believes, and the Justice Department has argued — they have, in practical effect, reached precisely that result. In these circumstances, it would be nothing short of irresponsible for Congress *not* to clarify FACA's balanced representation provision.

C. *Current Proposals For Resolving The Balanced Representation Problem Are Inadequate.*

As noted earlier, there is widespread consensus that FACA's balanced representation provision must be clarified and strengthened. Thus, the Federal Bar Association's Select Committee on FACA informed the Senate Committee on Governmental Affairs, in an April 6, 1989 letter, that the "Select Committee strongly favors the application of a practical, definable standard [of balanced representation]. Without it, the balanced membership requirement will continue to plague the courts, agencies, and the public alike." (Appendix D). Likewise, representatives of the Office of Management and Budget and the General Services Administration have implored Congress to clarify the provision. For example, in 1984, then-Deputy Director of OMB Joseph R. Wright, Jr. testified:

> What does the requirement for a "balanced membership" mean and when does it apply? ... Not only is it unclear *when* fairly balanced membership is required of the President or the heads of departments and agencies in establishing advisory committees, it is also unclear when it *is* required.

Hearing before the Subcommittee on Information Management and Regulatory Affairs of the Senate Committee on Governmental Affairs, *Oversight of the Federal Advisory Committee Act*, 98th

Cong., 2d Sess. 28, 29 (June 21, 1984) (emphasis added). And, in more recent hearings, Paul T. Weiss, the Associate Administrator for Administration of GSA, reiterated the concerns of the executive branch "about the need for a definition of what constitutes balanced membership." Hearing Before the Senate Committee on Governmental Affairs, *Federal Advisory Committee Act and the President's AIDS Commission*, 100th Cong., 1st Sess. 59 (Dec. 3, 1987). These views, of course, complement the Justice Department's position in federal court — *i.e.*, that the balanced representation provision is so vague that it cannot even be judicially enforced.

While there appears to be agreement that FACA's balanced representation provision must be improved, a similar consensus does not exist on the means of accomplishing that improvement. Some suggestions have been made that the existing statutory standard can be left intact and that clarification should be supplied either by Congress in report language or by GSA in guidelines promulgated pursuant to section 7 of FACA. However, neither of these approaches is realistic. As the foregoing recitation of the case law suggests, unless the statute *itself* spells out objective, enforceable standards, the balanced representation provision will continue to be met with judicial disapproval rather than enforcement.

Indeed, as noted earlier and as Judge Edwards' opinion in the Microbiological Committee case makes clear, the existing legislative history contains numerous references to Congress's intent in enacting the balanced representation provision — particularly with regard to the desire to eliminate industry-dominated committees — yet that has not resulted in meaningful, consistent judicial consideration of claims brought under the provision. Similarly, as pointed out in the following section on FACA's coverage (*see infra* at p. 40), the Supreme Court has recently ruled that GSA's "interpretations of FACA's provisions" are not binding on the courts or federal agencies, particularly where they are not directly supported by "FACA's text." *Public Citizen v. United States Department of Justice*, 107 S. Ct. 2558, 2571 n.12 (U.S. June 21, 1989). The bottom line, therefore, is that unless Congress strengthens and clarifies the statute's balanced representation provisions, it must resign itself to having created a paper tiger.

The FACA bill introduced by Senator Glenn, S. 444, accomplishes several valuable changes with regard to the balanced representation issue. First, the bill more clearly reflects Congress's intent to apply the balanced representation provision to all advisory committees, including committees established or utilized by the President and executive branch agencies. Second, the bill requires that committee charters must set forth a plan for achieving balanced membership, which should have the salutary effect of compelling agency officials to focus on balance issues at an early stage, as well as providing the public and the courts with a record of the agency's effort to achieve balance.

Both of these reforms, however, are largely hollow in the absence of an improvement in the underlying, substantive requirement for balanced representation. Thus, as the OMB testimony cited earlier confirms, making it clear that all committees must comply with a "requirement" for balanced representation is largely ineffectual *unless* federal officials know what that requirement means. Similarly, mandating a plan for achieving balanced membership accomplishes very little, if anything, if there are no objective statutory yardsticks by which to prepare or judge the plan.

Unfortunately, S. 444 does not significantly clarify FACA's requirement for balanced representation. The Findings and Purposes section of the bill does contain the helpful, common-sense admonition that, in seeking to attain balanced representation, agencies should give "emphasis ...

to considering for membership those interests which will be directly affected by the work of the committee and to obtaining expertise relevant to the work of the committee . . . ." S. 444, § 3(5). As demonstrated earlier, however, federal judges have already indicated that they do not regard the "directly affected" test as particularly useful in resolving concrete disputes, especially where a committee has a broad mission and its composition is being challenged, as is generally the case, before it has actually formulated specific recommendations affecting particular groups or interests. *See, e.g., National Advisory Committee on Microbiological Criteria for Foods*, slip op. at 3 (Judge Silberman, concurring in the judgment) ("the line between those with 'direct interests' and those with indirect or tangential ones is hopelessly manipulable"); *National Ass'n of People with AIDS v. Reagan, supra*, slip op. at 14 (prior to the development of recommendations, it was "[s]peculative or theoretical" whether the AIDS Commission would "make recommendations adverse to plaintiffs' interests"). At best, the "directly affected" standard, as it has evolved in the courts, affords an opportunity for judicial relief only *after* a committee has drafted specific recommendations whose effect on various groups and interests can be assessed. *See id.* at 15.

As the Grace Commission case illustrates, moreover, an after-the-fact judicial declaration that specific recommendations violate FACA because they adversely affect an excluded group is not a satisfactory result for anyone concerned with a committee's work. It does little good for the excluded group, which is given no opportunity to actually influence the committee's deliberations in a positive fashion, and it is disastrous for committee members and government officials, who will have wasted huge amounts of time and money developing recommendations eventually declared to be illegal. The interests of all concerned would obviously be far better served by a balanced representation provision that can reasonably be applied at the time committees are first established and constituted, before significant resources have already been devoted to deliberations and the development of recommendations. Stated simply, if Congress is truly serious about requiring advisory committees to have "balanced representation," and about giving agencies, courts, and the public the tools necessary to efficiently and sensibly resolve disputes regarding balance, it must go beyond the revisions in S. 444.

D. *A Proposed Solution to the Balanced Representation Dilemma*

The difficulty faced in attempting to devise a meaningful balanced representation requirement is to draft a provision with objective standards that can be applied and enforced when committee are first created and constituted, but which also afford agencies sufficient flexibility to select members for a wide variety of committees. While there is no perfect answer, we believe that the only viable solution is a provision that delineates basic categories of interests that should generally be represented on committees unless the agency makes a finding to the contrary. Hence, the provision we propose is as follows:

> **The membership of all advisory committees must be fairly balanced in terms of the points of view represented and the committee functions to be performed. In order to meet this requirement, committees must have some representatives of the following groups: (1) the affected industry; (2) consumer, environmental, health or other similar public interest groups; and (3) state or local governments or subunits. These categories are not exclusive, and each of them can be waived by the appointing authority if a determination is made in writing explaining why the category is not germane to the work of the committee. This determination is subject to judicial review.**

This provision would dovetail with FACA's original legislative history, as well as with S. 444's requirement for the preparation of a balanced representation plan, since the plan could both list the categories of interests and viewpoints that the agency is striving to place on the committee, as well as furnish any determination regarding the categories that are not being represented. Moreover, the provision would remove obstacles to effective judicial enforcement by expressly codifying that which is already implicit in FACA's legislative history — *i.e.*, that agencies and courts should focus, for purposes of the balanced representation requirement, on objective factors like the employment status or organizational affiliation of prospective members, rather than on more subjective, amorphous concepts such as the "viewpoints" of particular individuals. *See National Advisory Committee on Microbiological Criteria for Foods, supra*, slip op. at 12 (Judge Edwards, concurring in part and dissenting in part) ("[a]s the legislative history indicates, Congress intended 'balance' to be judged by the members' employment status and background, not their professed personal opinions").

Under the proposed provision, for example, it would be unnecessary and inappropriate for courts to inquire into whether an industry representative might adequately represent the viewpoints of consumer or environmental groups on a committee or, for that matter, whether a representative of a public interest group might represent the viewpoint of the regulated industry. Rather, the provision would merely make explicit the common-sense notion that some persons associated with both the regulated industry and public interest groups should be represented on such bodies as the Microbiological Committee or Senator Glenn's hypothetical pesticides committee.

There may, of course, be situations where agencies attempt to circumvent the intent of the provision by, for example, labeling members of committees as "consumer representatives" when in fact they are closely associated with the industry. Indeed, a Common Cause study conducted in 1984 "discovered a number of 'public members' [of advisory committees] who were closely associated with industry-funded organizations." Common Cause, *Public Advisers/Private Interests*, at 33 (February 1984). One example involved the appointment of the executive director of the American Council on Science and Health — which is financially supported by petrochemical and pharmaceutical companies — as a "public member" of the EPA's Toxic Substances Advisory Committee. *Id.*

This kind of abuse could be mitigated in several ways. To begin with, if, as we advocate in the preceding section, agencies are required to maintain and make available to the public conflict of interest forms that divulge the financial and other interests that members have in the work of the committee, it would greatly deter efforts to pass off persons with substantial industry ties as "public interest" representatives. Moreover, legislative reports accompanying any FACA amendments should stress that, in lawsuits arising under the balanced representation provision, courts may be called on to determine whether committee members are b*ona fide* representatives of the groups which they have been designated as representing. For example, a court considering a challenge to the composition of the Toxic Substances Advisory Committee would be required to assess whether its "public members" actually work for, or are affiliated with, legitimate environmental or public interest organizations, as well as whether the committee as a whole is "fairly balanced in terms of the points of view represented . . .." 5 U.S.C. App. II § 5(b)(2).

A number of other criticisms might be leveled at the provision but none are weighty enough to counterbalance the benefits of a meaningful, enforceable balanced representation requirement.

Thus, it might be argued that the provision establishes inflexible "quotas" for advisory committees but that is not the case: the provision merely requires "some representation" of the groups that are likely to have the most direct stake in the work of advisory committees, and it allows even those groups to be excluded so long as the agency makes the appropriate determination.

In addition, any argument that it is improper to spell out general categories of interests that should be included on advisory committees would fly in the face of the fact that Congress has routinely adopted this approach when it has created advisory committees in specific statutes. As Judge Friedman observed in the course of commenting on the vagueness of FACA's balanced representation provision:

> In contrast [to FACA], in other statutes governing the composition of advisory committees, Congress specified precisely which groups were to be represented. For example, section 17 of the Federal Energy Administration Act of 1974, enacted two years after the FACA, provides [for the representation of] "industry and users affected, including those of residential, commercial, and industrial consumers" . . ..

National Advisory Committee on Microbiological Criteria for Foods, slip op. at 11 (Judge Friedman, concurring in the judgment), quoting 15 U.S.C. § 776.

Other examples of statutes that delineate the kinds of interests that must be represented on committees are:

- the **National School Lunch Act** established the National Advisory Council on Child Nutrition, and requires that it contain representatives of school officials, persons serving on school boards, and parents of children who are beneficiaries of the school lunch program. 42 U.S.C. § 1763;

- the **Child Nutrition Act of 1966** creates a National Advisory Council on Maternal, Infant and Fetal Nutrition, and requires the Secretary of Agriculture to select members from specific representational categories, including local public health officials, representatives of public-interest organizations, and affected businesses. 42 U.S.C. § 1786;

- the **Employee Retirement Income Security Act of 1974** establishes the Advisory Council on Employee Welfare and Pension Benefit Plans and requires that its members include "representatives of employee organizations[,] employers, [and] . . . the general public." 29 U.S.C. § 1142(a)(3).

If the delineation of representational categories does not excessively hamstring agencies when Congress is creating specific advisory committees — as appears to be the case — then it is difficult to treat seriously any opposition to the adoption of a similar but more generic requirement in FACA itself.

Furthermore, any suggestion that agencies will have difficulty satisfying the minimal requirements of the proposed provision is belied by the experience of the Office of Technology Assessment ("OTA"). OTA is not subject to FACA's requirements because it furnishes recommendations to Congress rather than the executive branch, yet it nevertheless has a commendable record of

establishing balanced advisory bodies to assist it in conducting studies that have public policy overtones. For example, OTA's Urban Ozone and Clean Air Act Advisory Panel not only has members from industry (Ford Motor Co. and Union Oil), but also representatives of environmental groups (Natural Resources Defense Council and The Conservation Foundation), public health organizations (American Lung Association) and state and local governments (California Air Resources Board). OTA, *Annual Report to the Congress*, at 119 (Fiscal Year 1988).

Similarly, OTA's Superfund Implementation Advisory Panel has representatives of industry (General Electric and E.I. Du Pont), public interest organizations (Clean Water Action Project and Citizens Clearinghouse for Hazardous Waste), academia (Texas A & M University and University of Tennessee) and state governments (Illinois Environmental Protection Agency and Louisiana Department of Environmental Quality). *Id.* at 78-79. In essence, therefore, OTA has adopted the same basic approach to balance that we are proposing and, since it is not even subject to FACA's balanced representation requirement, OTA can only have done so because it believes that this approach furthers, rather than undermines, its ability to render objective, comprehensive advice to the Congress. In light of OTA's experience, executive branch officials would be hard-pressed to argue that a meaningful balanced representation requirement such as the one we advocate would somehow interfere with their ability to establish and use advisory committees.

A final objection that might be raised with regard to the proposed provision is that since several of the suggested representational categories are never germane to certain kinds of advisory committees — peer review bodies that review grant applications being an obvious example — the provision would create an additional, unnecessary paperwork burden on agencies. That problem could readily be resolved, however, by making it clear that agencies can make certain across-the-board determinations.

By way of analogy, federal agencies are required by the National Environmental Policy Act to prepare Environmental Impact Statements ("EIS's") before implementing major federal actions that might significantly affect the environment. To avoid making individual determinations of whether each and every agency action requires preparation of an EIS, most agencies have issued regulations creating broad categorical exclusions for certain kinds of actions that will never entail significant environmental impacts. Similarly, agencies such as the National Science Foundation or the National Institutes of Health could simply issue a single categorical determination that certain representational categories are never germane to the technical functions of their peer review committees.

E. *Conclusion*

Overhauling FACA without significantly clarifying and strengthening the balanced representation requirement would leave the Act with a gaping flaw that all observers agree must be fixed. Indeed, amending the statute without taking such corrective action might very well leave members of the public even worse off than before because courts would assume that Congress, intimately familiar with the courts' criticisms of the provision as vague and unenforceable, intentionally decided ***not*** to adopt a more meaningful requirement. Since "balanced representation" is an inherently ambiguous concept that lends itself to a myriad of possible interpretations and applications, the only sensible solution is to craft a provision that is based on discrete representational categories. The provision we propose not only provides objective, ascertainable standards, but it also takes into account the need for agency flexibility in dealing with many different kinds of advisory committees.

III. THE COVERAGE OF FACA MUST BE CLARIFIED

The threshold question that must be answered in any dispute arising under the Federal Advisory Committee Act is whether the Act applies at all to the particular advisory relationship in question. Obviously, if an advisory body is not covered by FACA, then none of the Act's safeguards or requirements are triggered. In such cases, industry and other special interests would be free to distort the advisory committee process, using it to lobby federal officials in secret rather than provide them with objective, expert advice.

In order to prevent such abuses, it is essential that the scope of the Act be both broad and well-defined. Unfortunately, the statutory definition of what constitutes an advisory committee is not a model of clarity. As one observer noted shortly after FACA was enacted:

> If the statute or at least its legislative history were more clear, no lengthy discussion of these coverage questions would be necessary. However, the Advisory Committee Act is an example of legislation containing serious ambiguities with respect to matters of fundamental importance. The result of Congress' failure to be more explicit is to create uncertainty regarding the obligations of federal agencies and corresponding uncertainty with regard to the rights under the Act of members of the public.

Marblestone, T*he Coverage of the Federal Advisory Committee Act*, 35 Fed. Bar J. 119 (Spring 1976). Moreover, as a consequence of the Supreme Court's recent decision in *Public Citizen v. Dep't of Justice*, 109 S. Ct. 2558 (1989) — which found that the American Bar Association's Standing Committee on Federal Judiciary was not covered by FACA — there is now even greater confusion concerning which entities are covered by the Act. Accordingly, any legislation amending FACA should include clarification of the basic coverage of the statute.

A. *FACA's Coverage of "Utilized" Committees Prior to the Supreme Court's Decision in the ABA Case.*

Section 3(2) of FACA defines an advisory committee, in relevant part, as:

> any committee, board, commission, council, conference, panel, task force, or other subgroup thereof ... which is ...
>
> (B) established or utilized by the President
>
> or
>
> (C) established or utilized by one or more agencies in the interest of obtaining advice or recommendations for the President or one or more agencies or officers of the Federal Government ...

5 U.S.C. App. II § 3(2). Ascertaining when committees have been "established" by the government has posed relatively few conceptual and legal difficulties for agencies and the courts. Far more difficult problems have arisen in determining when a committee that is not established by the government, but by a private organization or state or local officials, is being "utilized" as an advisory committee.

FACA itself does not define what is meant by a "utilized" committee, but the legislative history indicates that Congress intended the term to be construed broadly. Thus, while the House bill, as originally reported, did not expressly cover advisory bodies that are "utilized" by executive branch agencies, the committee report stated that the definition of advisory committee was "meant to include those committees which may have been organized before their advice was sought by the President or any agency, but which are *used by the President or any agency in the same way as an advisory Committee formed by the President himself or the agency itself.*" H.R. Rep. No. 1017, 92d Cong., 2d Sess. 4 (1972), *reprinted in* Source Book at 274 (emphasis added). The House Report further explained that "[i]it would be contrary to the purpose and intent of this bill if independent entities used as advisory bodies were to be exempted from the provisions of this bill." *Id.*; *see also Lombardo v. Handler*, 397 F. Supp. 792, 798 (D.D.C. 1975).

On the Senate side, there were also indications that privately created entities were intended to be covered by the statute if they were used in the same manner as committees established by the government. The Senate bill defined an advisory committee as encompassing "any committee ... established or organized for the purpose of furnishing advice, recommendations, or information to any office or agency." The Report explained that

> [T]he intention is to interpret the words "established" and "organized" in the *most liberal sense*, so that when an officer brings together a group by formal or informal means, by contract or other arrangement, and whether or not Federal money is expended, to obtain advice and information, such group is covered by the provisions of this bill.

S. Rep. No. 1098, 92d Cong., 2d Sess. 6 (1972) (emphasis added), *reprinted in* Source Book at 158.

Prior to the Supreme Court's decision in the ABA case, both the executive branch and the courts attempted to effectuate these expansive expressions of legislative intent by defining "utilized" committees in terms of the functions they actually performed, rather than with regard to how or why they were originally created. Thus, regulations issued by GSA, the agency charged with implementing FACA, *see* Executive Order 12,024, 42 Fed. Reg. 61,445 (1977), have, since 1983, defined a "utilized" advisory committee as:

> [A] committee or other group composed in whole or in part of other than full-time officers or employees of the Federal Government with an established existence outside the agency seeking its advice which the President or agency official(s) adopts, such as through institutional arrangements, as a preferred source from which to obtain advice or recommendations on a specific issue or policy within the scope of his or her responsibilities *in the same manner as that individual would obtain advice or recommendations from an established advisory committee.*

52 Fed. Reg. 45,930 (1987) (emphasis added); *see also* 41 C.F.R. § 101-6.1003. When this definition was proposed for public comment, it was not opposed by the Justice Department, the Office of Management and Budget, or any other federal agency. *See* 52 Fed. Reg. 18,774 (1987). In fact, the definition coincides with guidelines that were distributed by OMB to all government agencies immediately after FACA was enacted, *see* 38 Fed. Reg. 2307 (1973) (the "utilized by" language of FACA would apply, for example, "to an already existing organization of scholars enlisted by an agency to provide advice on a continuing basis"), as well as internal memoranda

prepared by the Justice Department shortly following FACA's enactment. *See, e.g.*, Memorandum from Acting Assistant Attorney General to Associate Assistant Attorney General, *Federal Advisory Committee Act*, at 2 (June 21, 1974) ("the pertinent material indicates congressional intent to cover privately established groups that are used by an agency in the same way as an advisory committee formed by . . . the agency itself"); Memorandum From Special Assistant to the Attorney General to Assistant Attorney General, Office of Legal Counsel, *Applicability of the Federal Advisory Committee Act to the ABA Standing Committee on the Federal Judiciary*, at 4 (January 23, 1974) (recommending a "functional approach to the matter of 'utilization' . . .. [T]he question depends on a number of factors, but *mainly upon the manner in which the agency uses the committee*") (emphasis added).

Judicial constructions of FACA prior to the Supreme Court's decision in the ABA case were also consistent with GSA's approach. For example, *Center for Auto Safety v. Tiemann*, 414 F. Supp. 215, 223 (D.D.C. 1976), involved meetings between the Federal Highway Administration ("FHA") and the American Association of State Highway and Transportation Officials ("AASHTO"), an organization consisting of representatives of state highway and transportation departments. The district court found that AASHTO was "utilized" as an advisory committee because "the government went directly to AASHTO, among other groups, for specific advice on draft regulations. In doing so, the "government employed AASHTO much as advisory committees are frequently and traditionally employed." 414 F. Supp. at 224. This ruling was affirmed by the D.C. Circuit:

> [W]e find nothing in the regulatory scheme of the Act to suggest that Congress intended to exclude organizations fitting the definition of advisory committee from coverage simply because they have an existence independent of the agency utilizing them . . .. [W]hen the Administrator [of the FHA] in the course of developing regulations to govern the Federal-aid highway program discloses his proposed regulations to select groups and obtains their advice and recommendations, he utilizes those groups as advisory committees.

Center for Auto Safety v. Cox, 580 F.2d 689, 694 (D.C. Cir. 1978).

A similar result was reached in *National Nutritional Foods Ass'n v. Califano*, 603 F.2d 327 (2d Cir. 1979), in which the Food and Drug Administration ("FDA") was considering whether to take regulatory action with regard to the use of liquid protein diets. In order to "assist the FDA in selecting the best course of action," agency officials decided to "obtain the advice of experts in the field of obesity research" and thus met with a group of such experts. *Id.* at 329-30. In determining that the meeting was covered by FACA, Judge Henry Friendly "considered the directness of the relationship between the alleged advisory committee and government action," and emphasized that the FDA had "leaned so strongly on the advisory group" in framing the regulation at issue. *Id.* at 336 & n.10.

Another decision construing FACA's coverage also demonstrates the flexible, common-sense approach that courts have generally taken in determining what constitutes an advisory committee. In *Nader v. Baroody*, 396 F. Supp. 1231 (D.D.C. 1975), Judge Gerhard Gesell held that FACA did not cover a series of meetings between executive branch officials and varying private sector groups. In so holding, he reasoned that FACA "was not intended to apply to all amorphous, ad hoc group meetings," or to "impede casual, informal contacts by the President or his immediate staff with interested segments of the population . . .." *Id.* at 1233-34. Rather, Congress intended

to cover "groups having some sort of established structure and defined purpose as 'advisory committees,'" and which receive a governmental "request for specific recommendations on a particular matter of governmental policy." *Id.* This view, once again, is entirely consistent with GSA's definition of "utilized" committees.

B. *The Supreme Court's Decision in the ABA Case*

Unfortunately, the sensible, functional approach that had evolved for ascertaining the existence of a "utilized" committee was thrown into disarray by the Supreme Court's ruling regarding the ABA Committee. In essence, in struggling to avoid unique constitutional questions that arise in the context of committees created to assist in the nomination process, a majority of the Court found it necessary to construe the term "utilized" contrary to its ordinary meaning. In doing so, the Court discarded the definition of the term that had been developed by GSA and the lower courts.

The exclusion of the ABA Committee from FACA's coverage is not itself of overriding importance, particularly since that advisory body would, in any event, have been able to deny public access to the vast majority of its meetings and documents under one or more of FACA's exemptions. Rather, the decision is troubling because, in the course of excluding the ABA Committee, the Supreme Court may have weakened the statute as a whole, making it possible for the Justice Department to argue that the Act should no longer be applied to almost all advisory committees that are "utilized" but not directly established by a federal agency.

In order to appreciate fully the adverse effect that the Supreme Court's decision is likely to have on the implementation of FACA, it is necessary to understand the advisory role of the ABA Committee and how the case came before the Court. For a number of years, the ABA Committee has advised the Justice Department on potential nominees to the federal bench. Under the present system, the Department initiates the advisory process by requesting that the ABA Committee evaluate the qualifications of potential candidates and provide a formal recommendation concerning them to the Department. Although the Department gathers information about prospective nominees from many sources, only the ABA Committee is regularly consulted before a recommendation is made by the Department to the President or before a nomination is sent by the President to the Senate. *Id.*

In 1986, the Washington Legal Foundation ("WLF") filed suit against the Justice Department, asserting that, although the Department routinely solicits the ABA Committee's advice and recommendations regarding prospective judicial nominees, it is not complying with any of FACA's requirements. In response, the Justice Department argued that the case should be dismissed on two independent grounds: (1) that the ABA Committee is not subject to FACA because it is not being utilized as a federal advisory committee; and (2) that FACA cannot constitutionally be applied to the ABA Committee without violating the Appointments Clause of the United States Constitution. Upon learning that the Justice Department had challenged the constitutionality of FACA as applied to the ABA Committee, Public Citizen intervened in the case.

District Judge Joyce Hens Green agreed with Public Citizen and WLF that "the ABA Committee is an advisory committee 'utilized' by DOJ within the meaning of FACA, 5 U.S.C. App. II, § 3(2), but [she held] that FACA cannot constitutionally be applied to the ABA Committee because to do so would violate the express separation of nomination and consent powers set forth in Article II of the Constitution and because no overriding congressional interest in applying FACA

to the ABA Committee has been demonstrated." 691 F. Supp. 483, 486 (D.D.C. 1988). Thus, Judge Green rejected the Justice Department's statutory argument, finding that the Department's use of the Committee is in fact covered by the "plain language" of the statute. *Id.* at 487. She further found that the Department's use of the Committee constitutes precisely the sort of advisory relationship that Congress and GSA intended to subject to FACA's procedural requirements:

> [T]he ABA Committee is a formal committee, with a clearly defined structure, singular purpose, and apparently only two "clients" — the Attorney General and the Senate Judiciary Committee. The ABA Committee is not merely a group of casually associated individuals who are consulted singly; it self-consciously and purposefully acts "as a committee." The ABA Committee is thus a traditionally, routinely, and preferentially utilized source of advice for DOJ and the President on potential nominees for federal judgeships.

Id. at 489 (footnotes omitted).

Since the "plain language of FACA, its legislative history, its purpose, and GSA's interpretation of the Act all support the conclusion that the ABA Committee falls within FACA's definition of advisory committee," Judge Green reasoned that the constitutional issue raised by the Justice Department could not be avoided. *Id.* at 491. Judge Green then ruled that FACA's requirements could not constitutionally be applied to the Department's use of the ABA Committee without violating the Appointments Clause, under which the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Judges of the Supreme Court and all other Officers of the United States, whose Appointments are not herein otherwise provided for . . .." U.S. Const., art. II, § 2, cl. 2.[5]

In the Supreme Court, the Justice Department argued that application of FACA to the ABA Committee would violate the Appointments Clause and thus the Act

> should be read to avoid a constitutionally suspect outcome . . .. So read, the Act should be held not to apply to the President's reliance on private organizations for advice in the exercise of his Article II prerogative to nominate officers of the United States.

Brief for the Federal Appellee, *Public Citizen and Washington Legal Foundation v. United States Department of Justice*, Nos. 88-429 and 88-494, at 8, 9 (U.S. March 1989). Importantly, the Justice Department did *not* argue that its restrictive definition of the term "utilized" should be applied to advisory committees other than those rendering advice on matters exclusively committed to the President by Article II of the Constitution, such as the nomination of federal judges.

To the contrary, the Justice Department conceded that Congress *does* have a constitutional right to regulate advisory committees that are utilized by federal agencies and the President in the course of implementing federal statutes, and, indeed, that one of the "two fundamental purposes of FACA" was to "minimize the risk that special interest groups would influence or direct the implementation of congressional policy in a manner at odds with the public interest." *Id.* In other words, the Justice Department acknowledged that Congress did — and constitutionally could —

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5 Because the district court had declared the application of a federal law unconstitutional, the Supreme Court had direct jurisdiction over the appeal pursuant to 28 U.S.C. § 1252, which has since been repealed.

extend FACA's coverage to privately established, industry-dominated committees "who work closely, and behind closed doors, with regulatory agencies" that are charged with implementing statutory schemes. *Id.* at 25.

Unfortunately, in the course of ruling that the ABA Committee is not being "utilized" as an advisory committee, a majority of the Supreme Court appears to have adopted a definition of that term that is even narrower than the one urged by the Justice Department, and which may even exclude the kinds of industry-dominated committees that the Department conceded are covered by the Act. To begin with, the Court emphasized that its analysis of FACA's coverage was heavily influenced by the constitutional concerns that arise in the context of any regulation of the President's nominating power:

> That construing FACA to apply to the Justice Department's consultations with the ABA Committee would present formidable constitutional difficulties is undeniable. The District Court declared FACA unconstitutional insofar as it applied to those consultations, because it concluded that FACA, so applied, infringed unduly on the President's Article II power to nominate federal judges and violated the doctrine of separation of powers. Whether or not the court's conclusion was correct, there is no gainsaying the seriousness of these constitutional challenges.

109 S. Ct. at 2572 (footnote omitted).

Like the Justice Department, the Court did not suggest that similar constitutional concerns would apply to committees established by private entities and used by agencies in the normal course of implementing congressional policies, rather than powers assigned to the President under Article II. Nevertheless, the Court's actual construction of the term "utilized" is so narrow that it will seriously hamper efforts to apply FACA's safeguards to virtually all committees that are "utilized," though not directly established, by the executive branch.

In order to avoid the common-sense conclusion that the ABA Committee is indeed being "utilized" for its advice, the Court concededly found it necessary to depart from the "straightforward reading" and "common sense of the term . . . ." 109 S. Ct. at 2565. Instead, the Court engaged in a lengthy review of the executive orders that preceded passage of FACA, as well as FACA's legislative history, and found no indication that Congress specifically intended to apply FACA's requirements "to the Justice Department's consultations with the ABA Committee." *Id.* at 2568. However, rather than simply announce that Congress did not intend to cover the ABA Committee, the Court's opinion is cast in far more sweeping terms that border on reading the term "utilized" out of the Act entirely.

Thus, despite the Senate Report's admonition that FACA's coverage should be construed in its "most liberal sense," Senate Report at 8, the Court suggested that the Act was *not* intended to cover entities that are privately established but come to be used by the government as advisory bodies. Rather, according to the Court, the phrase "established or utilized" was intended

> simply to clarify that FACA applies to advisory committees *established* by the Federal Government in a generous sense of that term, encompassing groups formed indirectly by quasi-public organizations such as the National Academy of Sciences "for" public agencies as well as "by" such agencies themselves.

109 S. Ct. at 2570 (emphasis added).

Other excerpts from the Court's opinions similarly suggest that the term "utilized" only applies to advisory committees that are the "offspring of some organization created or permeated by the Federal Government," or to advisory bodies that can be "said to have been formed by . . . some semiprivate entity the Federal Government helped bring into being." *Id.* at 2570, 2571. Other than the National Academy of Sciences, however, the Court offered no examples of what it meant by "semi-private" or "quasi-public organizations," nor did it offer any general description or definition of such entities.

Perhaps the most ominous aspect of the Court's opinion, however, was its willingness to ignore the definition of "utilized" advisory committees that the executive branch itself had developed, in the form of GSA's regulations. The Court tacitly conceded, as Justice Anthony Kennedy noted in his separate opinion, that it is difficult to "imagine a better description of the function of the ABA Committee" than that contained in GSA's rules. 109 S. Ct. at 2578. However, the majority declared that GSA's definition could be disregarded because, among other reasons, it was not a "contemporaneous construction of the statute," and because FACA "does not empower [GSA] to issue . . . a regulatory definition of 'advisory committee' carrying the force of law." I*d.* at 2571 n. 12. In essence, therefore, the Court not only made it clear that *it* was going to ignore GSA's definition of the term "utilized," but it essentially announced that federal agencies and lower courts are also free to do so.

In his separate opinion, Justice Kennedy — joined by Chief Justice William Rehnquist and Justice Sandra Day O'Conner — lambasted the majority for "mar[ring] the plain face of FACA," giving "inadequate respect to the statute passed by Congress," engaging in the "unhealthy process of amending the statute by judicial interpretation," and "giv[ing] inadequate deference to the GSA's regulations interpreting FACA." 109 S. Ct. at 2574, 2578. Justice Kennedy also observed that, contrary to the majority's restriction of FACA's coverage to committees that are directly established by or for the federal government, it is

> not clear why the reasons a committee was formed should determine whether and how they are "utilized by" the Government, or how this consideration can be squared with the plain language of the statute.

Id. at 2578. And, underscoring the need to amend FACA as a result of the majority opinion, Justice Kennedy complained that

> The Court's ultimate interpretation of FACA is never clearly stated [but] . . . [it] seems to read the "utilized by" portion of the statute as encompassing only a committee "established by a quasi-public organization in receipt of public funds," or encompassing "groups formed indirectly by quasi-public organizations such as the National Academy of Sciences." This is not a "fairly possible construction" of the statutory language even to a generous reader.

Id. at 2580 (references omitted).

Rather than seriously distort FACA's coverage in this fashion, according to Justice Kennedy, the Court should simply have ruled that the Act could not constitutionally be applied to the ABA Committee because the Appointments Clause of the Constitution

> divides the appointment power into two separate spheres: the President's power to "nominate," and the Senate's power to give or withhold its "Advice and Consent." No role whatsoever is given either to the Senate or to Congress as a whole in the process of choosing the person who will be nominated for appointment.

109 S. Ct. at 2581.

Justice Kennedy did not suggest that there would be any constitutional infirmity in applying FACA's requirements to committees other than those assisting the President in carrying out functions that are textually committed to him by Article II of the Constitution, such as the nomination power. In particular, there is nothing in Justice Kennedy's opinion — just as there is nothing in the majority opinion or in the Justice Department's brief in the Supreme Court — to suggest that there would be any constitutional barrier to applying FACA to industry-dominated committees that are "utilized by" federal agencies in carrying out functions assigned to them by Congress.

C. *The Consequences of the Supreme Court's Decision in the ABA Case*

As Justice Kennedy predicted, the majority opinion will wreak havoc on the implementation and enforcement of FACA by federal agencies and lower courts. The opinion gives the Justice Department a green light to argue that virtually *no* committee established by an entity other than the federal government is covered by FACA. In addition, the opinion can be read as nullifying not only GSA's regulations but numerous lower court constructions of FACA, which have taken a far more expansive and functional approach to the meaning of the term "utilized."

In fact, the Justice Department is wasting no time in advancing precisely these arguments in a case now pending in federal court. *Center for Auto Safety v. Federal Highway Administration*, Civ. No. 89-1045 (D.D.C., Complaint filed April 17, 1989) is a follow-up lawsuit to *Center for Auto Safety v. Cox*, which was described earlier (at p. 36). The Center for Auto Safety is arguing that the Federal Highway Administration ("FHA") is utilizing the American Association of State Highway and Transportation Officials ("AASHTO") as an advisory committee because FHA is soliciting AASHTO's advice and recommendations on important issues of highway design and safety.

In moving to dismiss the case, the Justice Department has argued that AASHTO is not covered by FACA regardless of whether its advice is routinely being sought by the government. Instead, relying on the Supreme Court's decision, the Department contends that the "inclusion of 'utilized' in [FACA] was intended simply to indicate a broad reading of the term 'established,'" encompassing *only* "committees that are formed for the purpose of rendering advice to the agency by a quasi-public entity which the 'federal government helped bring into being.'" Defendant's Memorandum in Opposition to Plaintiff's Motion for Partial Summary Judgment, *Center for Auto Safety v. FHA*, at 17. Since "AASHTO was not formed indirectly by the Federal Government through the use of any quasi-public entity," the government concludes, it is not covered by FACA, and none of the statute's procedural safeguards apply to its use. *Id.*

In advancing these arguments, the Justice Department has made no effort to reconcile the Supreme Court's decision with the functional approach to FACA's coverage that was developed by GSA and lower courts since 1972. To the contrary, the Department has flatly contended that

the "precedential value" of both GSA's regulations and *all* prior caselaw "has been seriously undermined," and that courts should no longer "broadly interpret[] the term 'utilize'" to include "preexisting outside entit[ies]" that are used by federal agencies to obtain advice or recommendations. Defendant's Reply to Plaintiff's Opposition to Defendant's Motion to Dismiss, *Center for Auto Safety*, at 2. In fact, other than committees formed directly by the National Academy of Sciences — the example furnished by the Supreme Court — the Department has not suggested a single committee that it now regards as covered by the "utilized" prong of FACA.

Most troubling of all, the Justice Department has indicated that FACA should no longer be construed to cover even industry-dominated committees that are privately established but come to be utilized by a federal agency charged with implementing a federal statute. Thus, despite its concession to the Supreme Court that Congress passed FACA in order to "minimize the risk that special interest groups will exercise undue influence on the implementation of legislative policy," Brief for the Federal Appellee, *Public Citizen v. DOJ*, at 9, the Justice Department now contends that the "possibility of biased proposals" by an industry-dominated committee attempting to influence public policy on health or safety issues is completely irrelevant to "whether an advisory committee has been 'utilized' under the statute." Defendant's Reply Memorandum, *Center for Auto Safety v. FHA*, at 6. Under this analysis, for example, if the Federal Trade Commission was using a tobacco industry committee to obtain recommendations regarding health warnings on cigarettes, such an advisory relationship would not be covered by FACA. Or, to take an example suggested by Senator Glenn at a recent hearing on FACA, if the Environmental Protection Agency decided to routinely solicit recommendations on the health effects of pesticides from a committee composed of pesticides manufacturers, that advisory relationship, according to the Justice Department, would not be subject to any of FACA's safeguards or protections. *See* Hearing Before the Senate Committee on Governmental Affairs, *Federal Advisory Committee Amendments Act of 1988*, 100th Cong., 2d Sess. 19 (1988).

It is a truism in legal circles that "hard cases make bad law." That truism applies with particular force to the ABA case. Because of constitutional and political concerns arising in a unique factual and legal context, — *i.e.*, confidential assessments of potential nominees for federal judgeships — the Supreme Court issued a ruling that places the coverage of FACA as a whole in jeopardy, and specifically threatens to undermine what everyone agrees is one of the core objectives of the Act: the regulation of industry-dominated committees that influence federal policy on issues in which they have vested economic interests, particularly matters involving public health, safety, and environmental concerns.

D. *The Solution To the Problem: Codification of GSA's Definition of "Utilized" Committees*

Fortunately, while the problems caused by the Supreme Court's ruling are complex, the solution is not. As noted earlier, there already exists widespread consensus on a sensible, functional definition of "utilized committees" that could readily be incorporated into the statute: the one formulated by the General Services Administration. Both federal agencies and public interest organizations have found that GSA's definition strikes an appropriate balance between the government's need for flexibility in consulting with a variety of entities, and the public's need for access and accountability in situations where the executive branch adopts a committee as a continuous, preferred, and routine source of advice on a specific subject — in other words, where the committee is being "utilized" in precisely the same fashion as an advisory committee formally

established by the President or an agency. In fact, in recent letters to Senators Glenn and Levin, the Federal Bar Association's Select Committee on the Federal Advisory Committee Act — which is comprised of both federal advisory committee officers and public interest representatives — "support[ed] the amendment of FACA to include GSA's definition of a 'utilized' advisory committee." (Appendix D).

Moreover, as noted earlier, GSA's definition is consistent both with the analysis of FACA's coverage that has evolved in the lower courts, and with guidance previously issued by other executive branch entities, including the Department of Justice and OMB. In addition, the origin of GSA's definition is a 1980 recommendation by the Administrative Conference of the United States, which stated that "utilized" committees should be defined as those which have been "adopt[ed] . . . as a preferred source of advice." ACUS Recommendation No. 80-3, *Interpretation and Implementation of the Federal Advisory Committee Act* (1980), *reprinted in* Hearings Before the Subcommittee on Information, Management and Regulatory Affairs of the Senate Committee on Governmental Affairs, *Oversight of the Federal Advisory Committee Act*, 98th Cong, 2d Sess. 182 (1984). And, in turn, OMB has expressly endorsed the ACUS recommendation in testimony before the Senate Governmental Affairs Committee. *Id.* at 27 (Statement of Joseph Wright, Deputy Director of OMB). In view of these statements of support, it is difficult to envision any legitimate objection to simply incorporating the GSA definition into FACA itself.

In order to avoid the constitutional concerns that troubled the Supreme Court in the ABA case, we suggest that Congress expressly exclude from the general requirements of FACA all committees that are utilized for the purpose of assisting in the nomination process. If such committees are used, however, the government should be required to issue a public statement that explicates their purpose and function. Such a requirement would obviously not interfere with the President's nomination power, but it would at least inform the public and the Congress about the existence of the committee and the reason why the government is using it. Accordingly, we do not believe that such a provision would unconstitutionally impinge on presidential prerogatives.

Our recommendation for supplementing FACA's definition of advisory committee, which is contained in section (3)(2) of the Act, is as follows:

> **(5) (a) a "utilized committee" is a committee or other group composed in whole or in part of other than full-time officers or employees of the Federal Government with an established existence outside the entity seeking its advice which the President or agency official(s) adopts, such as through institutional arrangements, as a preferred source from which to obtain advice or recommendations on a specific issue or policy within the scope of his or her responsibilities in the same manner as that individual would obtain advice or recommendations from an established advisory committee, except that such term excludes committees utilized to assist the President in carrying out his responsibilities to nominate Officers of the United States in accordance with the Appointments Clause of the United States Constitution;**
>
> **(b) whenever any advisory body is utilized to assist the President in carrying out his responsibilities to nominate Officers of the United States, he must prepare a notice to that effect, which shall describe the function and purpose of the advisory body. The General Services Administration shall be responsible for publishing such notices in the Federal Register.**

APPENDIX A

FACA SOURCES AND RESOURCES

A. **General Services Administration.** GSA has general oversight responsibilities with regard to FACA. GSA has issued regulations construing and implementing FACA's provisions. They are codified in 41 C.F.R. part 101-6. GSA also issues an annual report containing information about the number of advisory committees, the costs of committees, and other general information. In addition, agencies are required to file advisory committee charters with GSA.

Contact: Charles F. Howton
Address: GSA, Committee Management Secretariat, Washington, D.C. 20405
Telephone Number: (202) 523-4884

B. **Advisory Committee Officers.** Each agency has an advisory committee officer who oversees the agency's compliance with FACA. In addition, each committee must have assigned to it a **Designated Federal Official** who is responsible for attending the meetings of the committee.

C. **Federal Bar Association Select Committee on FACA.** The FBA's Select Committee on FACA allows persons concerned about the implementation of FACA to exchange views and information. It is currently composed of federal advisory committee officers and other federal officials, representatives of public interest organizations, and other experts in FACA issues.

Contact: Brian Murphy, Chairman
Address: 1815 H Street, N.W., Washington, D.C. 20006
Telephone Number: (202) 638-0252

D. **Congressional Oversight.** The Senate Committee on Governmental Affairs and House Committee on Government Operations have oversight responsibilities regarding FACA.

Senate Committee on Governmental Affairs:

Chairman: Senator John Glenn
Address: 340 Dirksen Senate Office Building
Telephone Number: (202) 224-5018

House Committee on Government Operations:

Chairman: Representative John Conyers
Address: 2157 Rayburn House Office Building
Telephone Number: (202) 225-5051

APPENDIX B

PUBLIC CITIZEN'S POSITION ON S. 444

Aside from the issues discussed in the body of this report, S. 444 would make numerous other changes in the Federal Advisory Committee Act. As a general matter, it would reorganize and clarify the language of the statute in a useful and much-needed way. In addition, the bill would make several other changes, most of which Public Citizen strongly supports and others that we believe should be modified.

Subcommittees: S. 444 adopts a broader definition of subcommittee than current law. That definition includes any group established by a committee which is authorized to act on behalf of the committee and which reports either to the committee or directly to the President or an agency. This definition will ensure that committees cannot establish subcommittees to carry out the committee's work without complying with the FACA. It is a necessary amendment to the statute because *National Anti-Hunger Coalition v. Executive Committee of the President's Private Sector Survey on Cost Control*, 711 F.2d 1071 (D.C. Cir. 1983), excluded subcommittees that report to the parent committee from FACA's reach. The amendment would make those entities that, in fact, carry out the committee's work accountable under the Act.

Meetings: S. 444 adopts a workable definition of the term "meeting," which includes any interaction of committee members or subgroups that are authorized to act on behalf of the committee. Like the subcommittee definition, this definition of "meeting" ensures that an advisory committee cannot circumvent the Act by having subgroups carry out is functions.

Records: S. 444 specifically mandates that advisory committee records will be made available for public inspection and copying at a single location for at least one year after the committee ceases to exist. This amendment would end the confusion that permeates records requests that are made after the advisory committee issues its report, which often spark the public's interest in the committee's records. While agency advisory committees generally transfer their records to the appointing agency, and the records are then made available to the public under the Freedom of Information Act, presidential advisory committees may transfer their records to an office in the White House, which may refuse to make them available under the Freedom of Information Act.

For example, when the Tower Commission terminated its operations, its records were transferred to the White House Counsel, and he denied requests for access on the ground that his office is not an "agency" subject to the Freedom of Information Act. *See National Security Archive v. Archivist of the United States*, No. 88-5218 (D.C. Cir. pending). S. 444 would ensure that the public has access to such advisory committee records both during the committee's existence and for at least one year after the committee ceases to exist.

In addition, however, the bill should provide that all advisory committee records will be treated like agency records after the one-year period has elapsed, *i.e.*, they will be maintained and disposed of in accordance with all applicable federal records laws, such as the Freedom of Information Act and the Federal Records Act. Under the bill as currently drafted, it is not clear what the ultimate fate of advisory committee records is to be, including records that may have significant historical value. Section 12(c)(2) of the bill simply provides that five years after the date on which a record

is created it *may* be stored at the Archives; this seems to suggest that any record *may* be destroyed by an agency or the President at will. We suggest, therefore, that the following section be substituted for section 12(c)(2):

> After one year following the committee's termination, all advisory committee records will be treated as agency records of the federal agency which chartered the committee or GSA if no other agency chartered the committee.

State Officer Advisory Committees: S. 444 would exempt from FACA's coverage any committee composed wholly of full-time officers or employees of state or local governments who are required to meet with federal officers regarding programs that are shared by federal, state, and local governments or that are administered by state governments. S. 444, § 4(a)(C)(iv). This blanket exclusion is undesirable because it eliminates accountability and public scrutiny from many committees that play an important and often influential advisory role.

For example, the American Association of State Highway and Transportation Officials ("AASHTO") regularly meets with the Federal Highway Administration and the National Highway Traffic Safety Administration regarding safety issues of importance to the public. In such meetings, AASHTO is functioning in a manner that is directly analogous to that of the regulated industry and should, therefore, be subject to FACA's provisions, as the courts have previously determined.

Attorneys' Fees: S. 444 does not contain any provision expressly authorizing an award of attorneys' fees to parties that successfully challenge noncompliance with the Act. Such a provision should be added to ensure that the costs of bringing lawsuits do not deter individuals from enforcing the Act's provisions. Moreover, there is no logical reason why related statutes such as the FOIA and the Government-in-the-Sunshine Act should have attorneys' fee provision, but FACA should not.

FACA AMENDMENTS PROPOSED IN THIS REPORT:

Conflicts of Interest Reporting Requirements:

All members of federal advisory committees shall file annual written reports disclosing:

> (1) the individual's principal employment;
>
> (2) all other corporations, companies, firms, partnerships, business enterprises, research organizations, educational institutions, or other entities in or to which the individual serves as an employee, officer, adviser, director, owner, or consultant, including the subject matter of the individual's service, but only to the extent the entity or relationship is or may foreseeably become relevant to the purposes and functions of the advisory committee; and
>
> (3) the identity, but not the value or amount, of any sources of income or financial interests that are or may be relevant to the purposes and functions of the advisory committee.

The agency or appointing authority shall make the written reports filed pursuant to this Act available to the public.

Balanced Representation Requirement:

The membership of all advisory committees must be fairly balanced in terms of the points of view represented and the committee functions to be performed. In order to meet this requirement, committees must have some representatives of the following groups: (1) the affected industry; (2) consumer, environmental, health or other similar public interest groups; and (3) state or local governments or subunits. These categories are not exclusive, and each of them can be waived by the appointing authority if a determination is made in writing explaining why the category is not germane to the work of the committee. This determination is subject to judicial review.

Definition of Utilized Committees:

(a) a "utilized committee" is a committee or other group composed in whole or in part of other than full-time officers or employees of the Federal Government with an established existence outside the entity seeking its advice which the President or agency official(s) adopts, such as through institutional arrangements, as a preferred source from which to obtain advice or recommendations on a specific issue or policy within the scope of his or her responsibilities in the same manner as that individual would obtain advice or recommendations from an established advisory committee, except that such term excludes committees utilized to assist the President in carrying out his responsibilities to nominate Officers of the United States in accordance with the Appointments Clause of the United States Constitution;

(b) whenever any advisory body is utilized to assist the President in carrying out his responsibilities to nominate Officers of the United States, he must prepare a notice to that effect, which shall describe the function and purpose of the advisory body. The General Services Administration shall be responsible for publishing such notices in the Federal Register.

APPENDIX C

SUBSTANTIVE CONFLICT OF INTEREST REQUIREMENTS

Special government employees who work 60 days or less per year are subject to two general prohibitions. First, such individuals may not participate in deciding, making recommendations or rendering advice regarding matters in which they, their immediate family members, employers, or organizations with whom they are negotiating concerning prospective employment have a financial interest. 18 U.S.C. § 208. Second, such advisory committee members are barred from receiving or soliciting compensation in relation to, or representing private parties in, any proceeding involving specific parties, including the United States, in which the adviser participated by making recommendations, rendering advice, or otherwise. 18 U.S.C. §§ 203(a) & (c); 205. These latter restrictions continue to apply after the individual's employment as a special government employee ceases. *See* 18 U.S.C. §§ 207(a) and (b). Special government employees who work more than 60 days during the preceding year are subject to more stringent prohibitions that are not limited to matters in which they personally and substantially participated. *See* 18 U.S.C. §§ 203(a) & (c), 205, 207(b).

Aside from these criminal penalties, executive orders have also prescribed standards of ethical conduct for federal employees generally. These orders, which also apply to advisers who are special government employees, proscribe using an advisory position or inside information for private gain, receiving or soliciting anything of value from individuals having business with the agency, and creating the appearance of any of the above. *See* Exec. Order No. 11,222, §§ 302-305 (May 8, 1965); Exec. Order No. 12,565 (Sept. 25, 1986); Exec. Order No. 12,674 (April 12, 1989); *see also* 5 C.F.R. §§ 735.302-.305.

APPENDIX D

LETTERS FROM FEDERAL BAR ASSOCIATION SELECT COMMITTEE ON FACA TO SENATOR JOHN GLENN

April 6, 1989 51

April 25, 1989 54

August 26, 1989 55

Federal Bar Association

April 6, 1989

The Honorable John Glenn
Chairman
Committee on Governmental Affairs
United States Senate
Washington, D.C. 20530

Dear Mr. Chairman:

I am pleased to have the opportunity to supplement the testimony which I was privileged to give on March 15, 1989 on behalf of the Federal Bar Association Select Committee on the Federal Advisory Committee Act, concerning S. 444, the Federal Advisory Committee Act Amendments of 1989. I believe that the following comments are consistent with that testimony.

The Distinctive Characteristics of "Established" vs. "Utilized" Committees

The Select Committee feels that different standards should be applied to "established" and "utilized" advisory committees because of the significant differences in the characteristics of these two kinds of committees. Beyond the requirement of openness, it is not clear to us what provisions of FACA should apply uniformly to both types of committees. One court has expressed uncertainty as to whether FACA's balanced membership requirement can be applied to groups that are utilized instead of established by an agency. See Washington Legal Foundation Foundation v. U. S. Department of Justice, 691 F. Supp. 483, 485, n. 5 (D.D.C. 1988), prob. juris. noted, 109 S.Ct. 526 (December 5, 1988). Furthermore, as a practical matter, a "committee" that is not established by an agency may not be "utilized" by a government agency until its meetings are long past, its report completed, and its members no longer involved. The requirements of FACA cannot be observed retroactively. To charge the members with violations of law when they had no way of knowing that the law would apply would make no sense.

Accordingly, the Select Committee recommends that the separate concepts of "established" and "utilized" be treated separately in S. 444, imposing on each committee only those requirements that are appropriate for that type of advisory committee. It would also be useful to include a definition of the term "utilized" in the statute, and we feel that the one set forth in GSA's regulations, at 41 CFR 101-6.1003 (52 Fed. Reg. 45926, 45930, December 2, 1987), is instructive.

Disclosure Requirements

Proposed Section 10(c)(5) of the bill requires all Federal employees to disclose in writing an financial or other interest which may be affected by the work of a committee, or which creates the appearance of a conflict of interest. The Select Committee believes that a simplified short-form disclosure statement should be used, which reports: (1) any substantial financial interest a person may have in the

committee's work, and (2) any affiliation the person may have relevant to service on the committee. We support an exemption from the disclosure requirement for committees without fixed membership. It may also be helpful to authorize agencies to require fuller disclosure when they deem it to be appropriate.

Fair Balance

Several sections of S. 444 address the issue of balanced representation on Federal advisory committees. (See, for example, sections 3(1) and 7(3)). The Select Committee strongly favors the application of a practical, definable standard. Without it, the balanced membership requirement will continue to plague the courts, agencies and the public alike.

In order to establish a workable, balanced representation requirement, some members of the Select Committee feel that there should be a statutory delegation to GSA to develop a standard through its advisory committee management procedures. Accordingly, the Select Committee recommends that the Committee on Governmental Affairs re-evaluate this issue. Of course, we would be pleased to work with your staff on this matter.

Availability of Records

Proposed Section 12(a)(1) of S. 444 provides that, subject to the terms of the Freedom of Information Act, 5 U.S.C. Section 552(b), records which were made available to or prepared for or by an advisory committee, including materials such as reports, working papers, drafts, and studies, must be made available for public inspection and copying at the time the records are distributed to the advisory committee members.

In the view of the Select Committee, the extent of intended protection of materials used by an advisory committee in its work is not clear. We presume that only materials that are not exempt under 5 U.S.C. Section 552(b) would be made available to the public, but clarification by the Governmental Affairs Committee would be helpful.

Federal Personnel Classification of Advisory Committee Members

Although the term "special government employee" is not expressly used in S. 444, the term "Federal employee," which appears in several sections of the bill (see, for example, proposed sections 7(a)(7) and 9(c)(2)(B), seems to embody the concept. Members of the Select Committee consider that the designation "special government employee" (SGE) should not be applied to advisory committee members, because of the widespread confusion about the meaning of the term and because of the potential application of the U.S. Criminal Code to advisory committee members who are classified as SGE's.

Under 18 U.S.C. Section 205 (1982), a special government employee may not engage in or be compensated for representational activities before Federal agencies or, in some cases, the courts, in any particular matter involving specific parties in which he or she had been personally and substantially involved as a Federal employee. The sanctions can be severe: $10,000 fine, or imprisonment for not more than two years, or both.

Members of the Select Committee believe that, under ordinary circumstances, persons serving on advisory committees should not be subject to criminal sanctions, solely by virtue of their participation on such committees. This exposure, if clearly understood, could have a substantial chilling effect on persons contemplating service on advisory committees.

We suggest a return to the distinct Federal personnel classification of "Federal advisory committee member." This would permit the application of appropriate standards of conduct and concomitant sanctions for violations, without forcing Federal advisory committee members into a Federal personnel classification scheme which simply does not fit and which discourages service on Federal advisory committees.

The Select Committee would be pleased to discuss these matters with your staff. Thank you for the opportunity to comment.

Sincerely,

(b) (6)

'Brian C. Murphy
Chairperson
Select Committee on the
Federal Advisory Committee Act

Federal Bar Association

April 25, 1989

Lorraine Lewis, Esquire
Counsel
Committee on Governmental Affairs
United States Senate
Washington, D.C. 20510

Dear Lorraine:

I understand that the letter of April 6, 1989 from the FBA Select Committee on FACA to Senator Glenn may not have been sufficiently clear with regard to the issue of disclosure. I would like to provide this elaboration now:

> Every member of a Federal advisory committee should be subject to simple and uniform straightforward reporting requirements. The reporting would be adequate if it reveals an interest, such as an executive or other employment affiliation with the subject of the committee's work, or a significant financial interest (e.g., stock ownership, bond ownership, partnership, or trust beneficiary) in an organization or institution that is involved with the subject matter of the committee's work. It should suffice to report the interest but without the extent of it, such as the value of stock. If a person is selected for membership because of expertise in the subject, and the expertise arises, for example, out of the person's position as chief of research or high executive post, that affiliation should be enough.

I regret any confusion about this.

Sincerely,

Brian C. Murphy
Chairperson
Select Committee on FACA

Federal Bar Association

August 25, 1989

Senator John Glenn
Chairman
Senate Governmental
Affairs Committee
Washington, D.C. 20510-6250

Dear Senator Glenn:

On June 21, 1989, the Supreme Court decided Public Citizen v. Dep't of Justice, No. 88-429, holding that the American Bar Association's Standing Committee on Federal Judiciary is not being "utilized" as an advisory committee within the meaning of section 3(2) of the Federal Advisory Committee Act when it provides the Justice Department with recommendations regarding potential nominees to the federal bench. The Court's decision was greatly influenced by the unique constitutional concerns that arise in the context of the appointments process. In fact, three of the Justices, including Chief Justice Rehnquist, wrote a separate opinion concluding that the ABA Committee is covered by FACA but that such coverage violates the Appointments Clause of the Constitution, which gives the President the exclusive power to make nominations of federal judges.

As a result of the Supreme Court's ruling, there is substantial uncertainty as to what kinds of advisory committees are being "utilized" by the government and thus must comply with FACA's requirements. Accordingly, any effort to clarify and strengthen the law, such as the one you are undertaking, would be incomplete in the absence of some clarification of the law's basic coverage, i.e., which kinds of entities are being "utilized" as advisory committees and which are not. Fortunately, we believe that there already exists widespread consensus on a workable definition of "utilized committees" that could be readily incorporated into the statute. Since 1983, the General Services Administration, in its implementing regulations, has defined a "utilized committee" as

> a committee or other group composed in whole or in part of other than full-time officers or employees of the Federal Government with an established existence outside the agency seeking its advice which the President or agency official(s) adopts, such as through institutional arrangements, as a

APPENDIX E

SAMPLE CONFLICT OF INTEREST REPORTING FORM

Name: _____

Advisory Committee Position: _____

Date of Appointment: _____

Principal Employment: _____

Other Employment (Include all entities in or to which you serve as an employee, officer, adviser, consultant) that is or may foreseeably become relevant to the purposes and functions of the advisory committee:

_____

_____

Subject matter of service where it concerns a particular matter that may come before the advisory committee:

_____

_____

Financial Interests (Include identity but not value or amount of those sources of income) that are or may be relevant to the purposes and functions of the advisory committee:

_____

_____

> **preferred source from which to obtain advice or recommendations on a specific issue or policy within the scope of his or her responsibilities in the same manner as that individual would obtain advice or recommendations from an established advisory committee.**

41 C.F.R. § 101-6.1003 (1988).

We believe that this definition, which has generally met with approval by both government agencies and public interest organizations, strikes an appropriate balance between the government's need for flexibility in consulting with a variety of groups on many issues, and the public's need for access and accountability in situations where the executive branch expressly adopts a committee as a continuous, preferred, and routine source of advice on a specific subject -- in other words, where the committee is being used in precisely the same fashion as an advisory committee formally established by the President or an agency. Accordingly, we support the amendment of FACA to include GSA's definition of a "utilized" advisory committee.

As we have noted in the past, there is some disagreement among the members of our Committee regarding whether "utilized" advisory committees should be subject to all of the requirements of FACA. Thus, while we are in agreement that all committees covered by FACA, including utilized committees, should comply with the openness requirements of the law, a similar consensus does not exist with respect to whether utilized committees should comply with, for example, the balanced representation and conflict of interest provisions of the statute.

Finally, in order to avoid any constitutional problems of the kind that troubled the Supreme Court in the ABA case, we suggest that Congress expressly exclude from FACA's requirements advisory committees that are utilized for the purpose of providing advice to the President or his subordinates with regard to nominations. However, when such committees are used, the government should be required to issue a public statement that explicates the committee's purpose and function. We do not believe that such a minimal requirement would interfere at all with the President's nomination power, and it would at least serve to inform the public about the existence of the committee and the reason why the government is using it.

Thank you for considering our comments on this important matter, and for your ongoing efforts to strengthen the Federal Advisory Committee Act.

Sincerely,

(b) (6)

Brian Murphy
Chairperson
Select Committee on the
Federal Advisory Committee Act

7/18/97

Author: Susan Courtney at GSA-MC
Date: 7/14/97 11:34 AM
Priority: Normal
TO: Vincent Vukelich
Subject: Suggested Improvements for GSA Regs - FACA

Vince: Listed below are some items that arise fairly consistently in our FACA courses as well as telephone inquiries. They are in no particular priority order nor are they specified for the guidance handbook vs. the proposed regulation itself. No doubt many are covered in other comments you have received, however, here they are as promised:

1. Clarification on whether it's ok to run multiple federal register notices for a committee's meeting events during the year. (blanket)

2. Clarification on whether a charter requires a signature. (filed w/ head of agency)

3. Raising awareness that regs are definitive, but caselaw dictates overall interpretation of FACA. This is not clear to many, since few really want to analyze caselaw at any length. (preamble discr. or litigative history)

4. Clarification the definition of an advisory committee, what is, what isn't, how do I know, what tells me?

5. Stronger language on one-time meetings -- often interpreted different ways organizational mtgs?

6. Clarification on recordkeeping requirements -- how long does the committee/agency/CMO keep the committee files once they have terminated? Can they go to the records center for storage if the committee has been meeting for 10 years or more and the agency has run out of space? disposition

7. Selection of members - strengthen language that lets folks know that agencies are responsible for membership selection/balance. Not up to GSA--we cannot interpret for them. Clarify solicitation of member process. Left no judicial standards

8. Strengthen the language about agency heads having the final determination in establishing an advisory committee. It is between they and OMB, not GSA. EO 12838 consultation approval/concurrence

9. Consider incorporating ceiling language in the regs should we forecast this exercise to be around for awhile. A-135 - or other Presidential directives.

10. Clarify guidelines on what public participation means or let the agencies come up with their own guidelines. In mtgs (Sec. 10) define

11. Strengthen language in guidance handbook or regulation to incorporate the partnership between the Library of Congress (records) + NARA

12. Strengthen language in guidance handbook or regulation to incorporate the partnership with the Office of Federal Register and how to get help, i.e., discounts, multiple listings, emergency assistance.

13. Clarify precisely what documents are needed to be sent to the Library of Congress from a committee. (8 copies of charters & annual substantive reports) Final closed mtg repts

14. Incorporate any resources in the guidance handbook that outlines

the SWAT team approach CHowton suggested for doing committee management effectively. (Protocols) expand CMO duties roles/duties

15. Peer review/scientific review inclusion language in Q&A. will DOI exec consider? 30 days

16. SGE - clarification. - w/ w/o compensation -

17. major - Minor admendments when?

18. what is a reg neg committee and how is it different from another Advisory Committee?

19. Guide Book - Training expand CMO duties available

20. stat groups - review see FY 95 A.R. Clinton Ltr. A-19 process?

21. standard cost accounting across Government - how to report on A.R. forms) All depts

22. annual Comprehensive Review - elaboration/use Strengthen

23. Records mgts. single location / CMO Office/records center - comm. death

24. Minutes/transcripts required dictionary clarification

25. Discretionary / non-Discretionary language for establishments. explain

26. Comm. established by Law + Exec. Order - also to go in Federal Register. explain

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www.westgov.org

July 2, 1997

VIA FAX

John
Marty
Mc
MV

'97 JUL 8 AM 1:19

G. Martin Wagner
Associate Administrator,
General Services Administration
Office of Governmentwide Policy
Room 5228 -- MC
1800 F St., NW.
Washington, DC 20405

Attention: FACA Regulations

Dear Mr. Wagner:

The Western Governors' Association adopted WGA Policy Resolution 97-014 *Federal Advisory Committee Act* (copy attached) at the association's Annual Meeting in Medora, North Dakota on June 24, 1997. WGA policy resolutions express the governors' collective position on significant issues and require a two-thirds vote of the governors for adoption. WGA is an Association of Governors from the eighteen western states and the three Pacific flag islands.

As expressed in the resolution before you, the Governors believe that FACA requirements have added addition costs and have limited opportunities for cooperation among the States, the Administration, Congress and those who live in the West.

The governors have noted on a number of occasions concerns about the statutes, regulations, policy and executive orders which are utilized to implement FACA. We welcome this opportunity by GSA to revise the regulations and ask that you carefully consider the points raised in the resolution as you look at the issues to be considered in revising the rule.

The governors are also ready to actively participate in any process you may utilize in addressing this important issue. Please contact me or our Wasington, DC office Director, Rich Bechtel, if additional needs or questions arise.

Sincerely,

(b) (6)

James M. Souby

Attachment 1

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Western Governors' Association
Policy Resolution 97 - 014

June 24, 1997
Medora, North Dakota

SPONSORS: Governors Symington and Romer
SUBJECT: Federal Advisory Committee Act

A. BACKGROUND

1. In 1972, Congress passed the Federal Advisory Committee Act (FACA) to regulate the numerous committees, boards, commissions, councils, and similar groups which have been established to advise officers and agencies in the executive branch of the federal government. FACA sets out a series of rigid rules, procedures and requirements that each advisory entity must follow if it is "established" or "utilized" by a federal agency.

2. Although states agree with FACA concepts of open government and public participation, states have found the requirements of FACA to be costly and burdensome. Because states, tribal and local governments have primary, exclusive or concurrent jurisdiction in the implementation of many federal laws or programs, the free flow of communication between states and federal agencies is essential. States have found that this free flow of information is adversely affected by the need to follow FACA procedures when advising or working with federal agencies and officials on the implementation of these laws and programs.

3. Due to these concerns, Congress enacted the Unfunded Mandates Act of 1995, which generally exempted from FACA federal consultations with state, tribal and local elected leaders and their representatives involving intergovernmental responsibilities or administration. Although this has helped address many of the states' concerns with FACA, these are still some problems that need to be addressed and resolved with FACA.

4. A new problem is the application of FACA restrictions to water-shed and community- based collaborative groups. The legal counsel of federal agencies such as the Forest Service have interpreted FACA as forbidding their receipt of consensus advice and recommendations from any group or committee which includes non-federal members unless the group is either chartered under FACA or specifically exempted from the Act. As a result, FACA has created an atmosphere of uncertainty about collaboration among federal officials and community-based groups.

5. Natural resource issues rarely abide by political boundaries, especially in the West where federal, state, local, tribal, and private lands are intermingled and where federal and state governments share jurisdiction over activities on federal

lands. The governors have found that good stewardship and the successful implementation of laws and regulations require all affected parties to share in the identification and resolution of problems.

B. GOVERNORS' POLICY STATEMENT

1. The clarification of FACA is fundamental to ensuring the implementation and development of current and future legislation and regulations. It is essential that federal officers and agencies collaborate with state, local, and tribal officials and their representatives in the spirit of the Unfunded Mandates Act of 1995.

2. The governors support "government in the sunshine" and believe the public deserves full access to the decision making process of government. States have a variety of "sunshine" requirements in their statutes and codes of administrative procedures that apply to state-federal negotiations without limiting the quality or quantity of those discussions.

3. The governors urge Congress to amend FACA or the Administrator of the General Services Administration (GSA) to clarify GSA's regulatory definition of an advisory committee that is 'utilized' by federal agencies to comport with the line of legal reasoning set out in the Supreme Court's *Public Citizen v. U.S. Department of Justice* (491 US S.Ct. 2558 (1989)) decision and subsequent decisions of the Court of Appeals for the D.C. Circuit. Only those advisory bodies over which the agency has strict management or control should fall under FACA as being 'utilized' by the federal agency. However, the membership of independent groups that do not fall under the jurisdiction of FACA, but in which federal agencies participate, must be balanced in terms of the points of view represented and the functions to be performed. They must operate in an open and accountable manner without being subject to the formal application of FACA.

   Whenever possible federal agencies should work with consensus, problem-solving groups like Endangered Species Act recovery plan implementation and conservation teams and independent water-shed councils and coordinated resource management committees. Federal agencies must collaborate if they are to successfully carry out their responsibilities and to tailor the implementation of their laws and regulations to the on-the-ground circumstances of the area where specific problems occur.

4. Advisory committees that are "established" by federal agencies also need to be addressed in a more flexible manner. While various directives from the Clinton Administration like Executive Order (EO) 12875 have mandated enhanced collaboration with stakeholders, EO 12838 regarding FACA makes collaboration difficult. The EO seeks to reduce the proliferation of advisory committees by requiring their establishment to be approved by the agency head and the director of the Office of Management and Budget. It also limits the creation of new advisory committees to only those instances when such important considerations as national security or public health or safety dictate them. National, regional, and local offices need the help of collaborative, short-term advisory bodies that are not captured by one point of view. This decision making should be decentralized. The Executive Order and FACA should be amended to allow the appropriate level of government to decide whether to establish an advisory committee. Agency heads should be able to establish national advisory committees without the approval of the heads of GSA and OMB. Agency regional directors should be able to establish regional and local advisory groups. Notice of their establishment should be in the *Federal Register* and provide a notice mechanism for enabling interested parties to be informed of individual meetings without requiring meeting notices to be published in the *Federal Register*.

C. GOVERNORS' MANAGEMENT DIRECTIVE

1. WGA staff is instructed to implement this policy by working with appropriate federal officials and congressional leaders.

Note: This policy resolution was originally adopted by the western governors in 1994 as 94-001. It was modified and readopted in 1997.

ADVOCATES FOR HIGHWAY AND AUTO SAFETY
750 First Street, N.E., Suite 901
Washington, D.C. 20002

March 14, 2000

General Services Administration
Office of Government wide Policy
Committee Management Secretariat
1800 F Street, N.W., Room G-230
Washington, D.C. 20405

Federal Advisory Committee Management
Proposed Rule, FPMR Amendment A-
65 FR 2504, January 14, 2000

Advocates for Highway and Auto Safety (Advocates) appreciates the opportunity to comment on the proposed rule to revise the General Services Administration (GSA) regulations and guidance on the Federal Advisory Committee Act (FACA), 5 U.S.C. App. 2. 65 FR 2504 *et seq.* (Jan. 14, 2000). Advocates and its staff has a long history of involvement with regulatory and legal issues involving the FACA. Members of the Advocates' staff have testified before Congress on FACA related issues and proposed legislation, served on the Federal Bar Association Select Committee on the FACA, and litigated legal issues under the FACA. Advocates staff has also participated as members on a number of advisory and negotiated rulemaking committees. The following comments are based on Advocates long experience with FACA and are intended to assist GSA in its efforts to provide information and guidance on the implementation of FACA to federal agencies and committee management personnel.

Advocates commends GSA for its efforts to provide guidance on the implementation of the FACA in plain English and in a clear format. We agree that the regulations and guidance to agency personnel should be easy for federal committee management officials and the public to understand. This will promote greater dissemination of the guidance, and reduce confusion regarding FACA requirements. The proposed rule provides positive guidance and beneficial information in a number of areas not previously covered by the regulations. This will be of great benefit to the public and to federal committee management personnel. However, the proposed rule does not provide sufficient information and guidance on a number of issues regarding public participation, fair balance and access to documents. Most important, the proposed rule does not accurately define the term "utilized" as used in FACA section 3(2).

Actual Management *or* Control

The most significant single issue for these comments is Advocates' disagreement with

GSA statement of the test for determining whether a committee is "utilized" within the meaning of the FACA. In the preamble to the proposed rule, GSA states that the test to be applied is one of "actual management and control" over a committee not established by an agency. The preamble also states that this enunciation of the test is consistent with case law. 65 FR 2504. Advocates does not believe that this is the correct statement of the law -- rather the applicable test is whether a federal agency has "actual management *or* control." The governing case law substantiates the use of the disjunctive in stating the test for "utilized" committees. We also contend that the use of the disjunctive makes sense in light of the rationale underlying the test. Finally, we point out that the proposed rule only uses the conjunctive "and" in the definition of the term "utilized," but uses the exclusive disjunctive "or" in other references to the test for " utilized" committees.

Definition of "Utilized"

The definition of the term "utilized" in section 102-3.30 of the proposed rule misstates the applicable test. The proposed rule states that a committee is "utilized within the meaning of the Act when the President or a Federal agency exercises actual management *and* control over its operation." 65 FR 2508 (emphasis added). This requires an agency to have both management of the committee and to exert control over the committee before the committee can be "utilized". The proper statement of the "utilized" test is whether an agency either has management of the committee or, in some fashion other than management, exerts control over the committee.

The controlling legal authority is *Washington Legal Foundation v. U.S. Sentencing Commission,* 17 F.3d 1446 (D.C.Cir. 1994). In that case, the Federal Court of Appeals for the District of Columbia Circuit gave structure to the U. S. Supreme Court's prior decision interpreting the term "or utilized." *See Public Citizen v. Department of Justice,* 491 U.S. 440 (1989). The Court of Appeals ruled that the word "utilized" indicates "something along the lines of actual management *or* control of the advisory committee." *Washington Legal Foundation* at 1450 (emphasis added). The operative criterion for determining whether a committee has sufficiently close ties to an agency in order to render it "utilized" is whether the agency has either management of the committee or exerts some other type of control, but not necessarily both. The decision directly turns on the phrase "management or control" -- the wording is clear and the case permits no other interpretation.

In *Washington Legal Foundation* the court established a two-prong test, using two separate criteria for determining whether a group is "utilized" within the meaning of the FACA. The text of the decision uses the exclusive disjunctive "or" to indicate that management is a distinct and separate criterion from control. A committee that has not been established by the

President or a federal agency is "utilized" if the President or an agency is either in charge of the management of the committee or exerts control over the committee by some other means.[1]

The importance of this distinction is readily evident. If the definition of "utilized" requires "management or control," then a federal agency would only have either to manage a committee or exert control over a committee in order for the committee to be subject to the requirements of FACA. Requiring a showing of both federal management *and* federal control increases the burden on those attempting to ensure that FACA requirements are met. The result of conjoining the two separate criteria into a single unit ("management and control") is to artificially reduce the number of committees that are potentially subject to the FACA. This was not intended by the Court of Appeals in *Washington Legal Foundation* or by the Supreme Court in *Public Citizen.*

In most situations it is less complicated for a federal agency to exert control through funding, contractual arrangements, support for meetings, setting the committee agenda and the like, than it is for an agency to manage the workings of a committee. Actual management would be a greater commitment of agency staff and supervisory personnel time in a much more public and official relationship. Thus, an agency can exercise control of committees, even illegal or so-called "phantom" committees, without "actually managing" the committees.

Furthermore, the proposed rule GSA uses both the conjunctive, "management and control," as well as the disjunctive, "management or control." The definition of the term " utilized" employs the conjunctive, while the description of committees that are excluded from FACA coverage uses the disjunctive. The proposed rule uses the phrase "management and control" in the definition of term "utilized" and twice reiterates this precise phraseology in the accompanying explanatory guidance in the "Key points and principles." 65 FR 2509. Subsequently, however, the proposed rule states that committees are not "utilized" within the meaning of the FACA "provided that such committees or groups are not actually managed *or*

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[1] The court reinforced the fact that the "management or control" test involves two distinct criteria when it concluded that the Sentencing Commission working group was not "utilized" under the FACA because "[t]he Commission manages *and* controls its own Advisory Group." *Washington Legal Foundation* at 1451 (emphasis added). The conjunctive was properly used in this statement to clarify that since the Commission both managed and controlled the Advisory Group, then the Department of Justice (DOJ) did not meet either criteria -- DOJ did not actually manage nor did DOJ control the advisory committee. Had DOJ met either prong of the test, the Advisory Group would have been a "utilized" committee.

controlled by the Executive Branch." Sec. 102-3.35, 65 FR 2508 (emphasis added). Although Sec. 102-3.35 addresses groups that are specifically excluded from FACA, and while it refers to the application of the test to FACA excluded groups in the negative, the logic of this provision clearly contradicts the prior use of the conjunctive in the definition of "utilized." Sec. 102-3.35 indicates that a committee is excluded only if both conditions are met, *i.e.*, it is neither managed nor controlled by a federal agency. It follows that if either condition is met, that is, if a federal agency either manages or controls the committee, then the committee is not excluded from FACA coverage. This statement correctly applies the *Washington Legal Foundation* test and contradicts the use of the conjunctive ("management and control") in defining the term " utilized."[2]

Similarly, Sec. 102-3.50 of the proposed regulations uses the term "actual management *or* control" in regard to Section 15 of the FACA. 65 FR 2511 (emphasis added). In explaining the relationship between federal agencies and the academies covered by Sec. 15, the proposed rule states that even under the amendments to the statute, "[a]gencies must not manage *or* control the specific procedures adopted by each academy." *Id.*, Sec. 102-3.50(b) (emphasis added). The proposed rule goes on to state that committees covered by Sec. 15 must be under both the actual management and the control of the academy, not a federal agency. In this instance the use of the conjunctive word "and"is appropriate and indicates that the academies cannot cede either

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[2]Advocates acknowledges that there may be some confusion on this issue. Some court decisions have contributed to confusion on this point by, at times, restating the *Washington Legal Foundation* "management or control" test using the conjunctive "and." These references, however, have only been intended to indicate that the terms "management", on the one hand, and " control", on the other, are both criteria of the test. *See, e.g., Byrd v. U.S. E.P.A.*, 174 F.3d 239, 246 (D.C. Cir. 1999) (agency actions did not qualify as "management and control sufficient to render the committee utilized under FACA). That this is a way of references both terms and not a restatement of the "management or control" test is obvious because, in most instances, courts only use conjunctive "and" after previously citing the precise language in *Washington Legal Foundation.* Thus, in *Animal Legal Defense Fund v. Shalala,* the court quotes *Washington Legal Foundation* to the effect that the "utilized" test requires "'something along the lines of *actual management or control* of the advisory committee.'" 104 F.3d 424, 430 rehearing *en banc* denied 114 F.3d 1209, cert denied 118 S. Ct. 367 (1997). It is unlikely that the court, which directly quoted and purposefully emphasized the disjunctive wording of the test, made a mistake or changed the test when it referred to management and control in the conjunctive later in the same paragraph. *Id.*

management or control of their committees to federal agencies lest they run afoul of the restrictions put in place in lieu of the "utilized" test.

Advocates recommends that GSA revise the proposed rule by changing "management and control" to "management or control" in the definition of the term "utilized" in section 102-3.30, and in both instances in which it appears in the "Key points and principles"guidance for that section. In addition, the explanation of this aspect of the proposed rule that appears in the preamble of the rule under the heading "What Significant Revisions Are Being Made?" should also be revised to reflect the fact that "management or control" is the legal test of whether a federal agency has "utilized" a committee.

Other"Utilized" Matters

In addition to the use of the disjunctive, Advocates makes two other suggestions related to GSA's guidance on the term "utilized." First, the current definition of the term "utilized" in the existing regulations includes the concept of a "preferred source" of advice. While Advocates understands that agency "management or control" is the legal standard to be applied to determine whether a committee is "utilized," there is room for retaining the "preferred source" concept. An agency can control a committee with an established existence outside the government "through institutional arrangements" that constitute the committee "as a preferred source from which to obtain advice or recommendations on a specific issue or policy . . . in the same manner as . . . advice or recommendations from an established advisory committee." 41 C.F.R. § 101-6.1003, *Definitions* ("Utilized" (or "used")). The "institutional arrangements" that permit the committee to become a "preferred source" of advice may well be sufficient to constitute either management or control by the agency. The proposed regulations should, at the very least, indicate that such " preferred source" arrangements must be carefully scrutinized to determine whether any attendant " institutional arrangements" meet the "actual management or control" test.

The second item is the example provided to clarify whether a group is "utilized." The sole example given is that of a "Town Meeting." 65 FR 2509, *Key points and principles/II. Is the group "utilized"?*. Advocates agrees that, in general, agency sponsored public meetings, and so-called "Town Meetings," are not subject to FACA. The proposed rule accurately states that " [s]ince the Government does not 'manage or control' (utilize) the assembled group, FACA does not apply." *Id.* at *Guidance*. In most cases, public meetings are held by an agency seeking input from members of the general public as well as from individuals and organizations in the interested public. There is no "committee" as such, and because public meetings do not lend themselves to either strict agency management or control, FACA is not relevant. It is valuable

for GSA to communicate this information in the guidance so that the public and agency officials have no confusion on this point. The public "Town Meeting," however, has never been a particularly controversial "utilization" issue, at least among FACA practitioners. Although the " Town Meeting" example clears up a misconception about agency-held public meetings, it does not provide any insight into situations that may constitute either actual management or control. Advocates recommends that the GSA add an example or two that apply the factors mentioned in the guidance for the definition of the term "utilized", *viz*; 1) does the agency appoint the group's members or otherwise determine its composition?, 2) does the agency set the group's agenda? and 3) does the agency fund the group's activities? *Id.* at *Key points and principles/I. Definition of "utilized"/Guidance* subsection A.

Operational Committees

The description of operational committees is troublesome because it provides a major potential loophole to FACA observance. Advocates agrees that truly operational committees, because they do not function to provide consensus advice and recommendations, are excluded from coverage of FACA. However, according to the proposed rule, an operational committee may only become subject to the FACA when it becomes "primarily" advisory in nature. Proposed rule § 102-3.35(k), 65 FR 2509. FACA will only be applied to an operational committee when it so thoroughly departs from its original mission that it becomes "primarily" an advisory committee. In essence, this sets an all or nothing standard for judging the advisory role of operational committees. This rule is unrealistic and invites abuse.

Most operational committees are unlikely to become "primarily" advisory in nature, nor would an agency which properly supervises such committees allow this to occur. That does not mean that operational committees would not perform essential and important advisory functions that should be covered under the FACA. The language in the proposed rule would allow, indeed encourage, agencies to manage their committees in such a way so that committees established as operational are given advisory functions as well.[3] According to the proposed rule this is legal so

[3]Agencies have the added incentive of a limitation on the number of discretionary advisory committees that are permitted. *See* Executive Order 12838 (Feb. 10, 1993) and Office of Management and Budget Circular No. A-135 (Oct. 5, 1994).

long as the advisory function was not the "primary" work of the committee, which, almost by definition, it would not be. Moreover, since the very agencies that might take advantage of this loophole are responsible for determining whether the functioning of an operational is "primarily" advisory or operational, agencies will have complete control over this process. An otherwise legally constituted operational committee, that need not meet any FACA requirements, can, therefore, legally perform many significant advisory functions so long as it is not deemed to be " primarily" advisory by the agency that is using it as an advisory committee.

To address this concern, Advocates recommends that the proposed rule require that operational committees should not perform advisory functions that are not directly related to the operational mission of the committee. If an operational committee performs an advisory function that is not directly related to its operational functions, then the committee must comply with the FACA and the GSA regulations. In addition, when an operational committee performs a significant advisory function that is directly related to the mission of the committee, it is also required to comply with the FACA and the GSA regulations.

Balanced Membership

The proposed regulations accurately state the requirement for balanced membership and governing policy regarding balanced membership. *See* GSA proposed rule §§102-3.15(c) and 102-3.75(c)(3). Beyond what is stated in the proposed rule, however, there is a need for pragmatic guidance to agency committee management personnel as to how they should accomplish the goal of balanced membership. The regulations should provide guidance regarding desirable attributes for an agency to include in its plan to attain fairly balanced membership. In addition, guidance could be provided about agency strategies of public outreach that have proven successful in contacting and retaining candidates for committee membership.

Conflict of Interest

GSA should also provide guidance to agency personnel on financial disclosure procedures and the need to carefully consider potential conflicts of interest among candidates for advisory committee membership. Committee management officials should be made aware of federal requirements and ethical obligations regarding financial disclosure to the federal government, and agency personnel should be provided guidance regarding the disposition of financial, as well as non-financial, conflicts of interests.

Public Access To Committee Records

The proposed rule does not delineate the right of the public to have access to advisory committee records and documents. Subpart E of the proposed rule states that it outlines the documentation that must be made available to the public. Proposed rule § 102-3.160 (65 FR 2517). However, public access to records is referred to only in connection with an agency determination to close a meeting to the public. Proposed rule § 102-3.180(d) (65 FR 2518). Public access to advisory committee records is not addressed. Advocates recommends that the GSA include a subsection that describes the right of the public to access to advisory committee records, including drafts of committee documents, minutes of meetings, and submissions of committee members, agency staff, as well as other members of the public, and that indicates that agencies have a duty to make committee records available to the public unless there is specific legal direction that provides otherwise. The regulations should further require agencies to publish how, when and where advisory committee records are available and the name of an agency official the public can contact in order to obtain access to the records. Public access to these records should be simplified as much as possible.

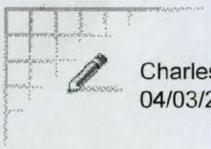
Definition of "Committee meeting"

Advocates concurs that the definition of the term "meeting" or "committee meeting" should encompass the idea that a meeting can take place through electronic means. Because the definition is intended to be expanded to cover "meetings" in which some or all of the participants are in different locations, the word "gathering" should be replaced or supplemented. Gathering implies a physical assembly or meeting in one place. While it may take on a broader meaning in the electronic age, it has not done so as yet. Advocates suggests the addition of the word interaction which suggests an interchange without connotation of a single location. The proposed rule would then read as follows: *Committee meeting* means any gathering <u>or interaction</u> of committee members (whether in person, through electronic, <u>or other</u> means) authorized by an agency for the purpose of deliberating on the substantive matters upon which the committee provides advice and recommendations.

Respectfully submitted,

Henry M. Jasny

General Counsel



Charles F. Howton
04/03/2000 07:58 PM

#F20

To: James L. Dean/MC/CO/GSA/GOV@GSA, Deborah F. Connors/MC/CO/GSA/GOV@GSA, editor@webdelsol.com
cc: stringfl@od.nih.gov

Subject: FW: New GSA FACA Rule

Comment #F20

DC -- hardcopy in your in-box.

MN -- for website.

LaVerne -- again, thanks again. Edited for format consistency. Will forward copy to Marie/Ellen at HHS.

---------- Forwarded by Charles F. Howton/MC/CO/GSA/GOV on 04/03/2000 09:37 AM ----------

From: "Stringfield LaVerne Y. (OD)" <StringfL@OD.NIH.GOV> AT internet on 03/30/2000 03:12 PM

To: Charles F. Howton/MC/CO/GSA/GOV
cc:

Subject: FW: New GSA FACA Rule

Comments from the Agency for Toxic Substances and Disease Registry (ATSDR), HHS. CDC provides them with administrative support including Committee Management.

1. It is clear that the original Federal Advisory Committee Act intended that subcommittees would be subject to all FACA requirements since the definition of the "term" advisory committee explicitly includes subcommittees.

2. This position is strengthened by the 1987 GSA Federal Advisory Committee Management Rule which identifies two types of subcommittees (dependent and independent) and clarifies the requirements and applicability for each.

3. There are real world, practical benefits from the retention of the definitions in the above regulations. For example, the Health Effects Subcommittees for DOE sites have enough commonality to effectively operate under one charter. However, they are geographically separated by large distances (i.e., Hanford and Savannah River); each site has a unique set of contaminants and therefore; a potentially unique set of health effects, concerns, and issues; and the communities surrounding each of the sites are demographically unique to that geographical area in each case. It would be very costly and time-consuming for all subcommittee representatives from all sites to travel to each meeting since their concerns and agendas would be so diverse.

Vickie Boothe, ATSDR

1. The requirement that "copies of each report or other document received, issued, or approved by the committee; and minutes of advisory committee and subcommittee meetings" be finalized within 90 days may be problematic for committees covering scientific issues. Highly scientific/technical issues being reported require an added level of quality assurance, increasing the time necessary to finalize the reports. We understand that some such committees approve the minutes of the preceding meeting at their next meeting -- which frequently occurs more than 90 days later.

2. There should be some provision for handling emergency situations included in the FACA Rule.

Gloria Kovach, ATSDR

#F8

Cape Cod National Seashore
Advisory Commission
99 Marconi Site Road
Wellfleet, MA 02667

March 14, 2000

3/17/00

General Services Administration
Office of Governmentwide Policy
Committee Management Secretariat (MC)
Rm G-230, 1800 F Street, NW
Washington, DC 20405 Fax: 202-273-3559
Attn: Charles F. Howton, Deputy Director

Subject: Federal Advisory Committee Act
Comments, Proposed Rule, Federal Advisory Committee Management
Federal Register, Vol.65(10), January 14, 2000, pp 2504-2519

Dear Mr. Howton:

The Cape Cod National Seashore Advisory Commission was established by statute, Public Law 87-126, August 7, 1961, and amended by Public Law 105-280, October 26, 1998.

I have read with interest your proposed revisions to the 'FACA.' I believe that the proposed rule is an improvement, and it appears that two of the revisions, in particular, will facilitate our work:

1. The clarification that subcommittees need not be bound by all the strictures applied to the full Commission is helpful. (p 2504, p 2517, sec. 102-3.170) Our subcommittees must occasionally meet on short notice.

2. The provision that will allow alternates "to represent the appointed member . . ." (table p 2517, sec. 102-3.125) will contribute to more productive discussion and ensure better representation for our constituencies.

Also, the "exclusion from FACA for intergovernmental activities" of certain groups and committees (table, p 2510, sec. 102-3.35) should facilitate efforts toward intergovernmental cooperation, a matter of priority here (CCNS General Mgt. Plan).

Finally, any changes that will expedite the appointment process and renewal of charter will be very welcomed.

Thank you for your efforts.

Yours truly,

Brenda J. Boleyn, Chairman
CCNS Advisory Commission

cc: Maria Burks, Superintendent CCNS

3/30/00

From: "Stringfield LaVerne Y. (OD)" <StringfL@OD.NIH.GOV> AT internet on 03/30/2000 03:07 PM

To: Charles F. Howton/MC/CO/GSA/GOV
cc:

Subject: Proposed Rule Comments

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More from CDC below.

LaVerne Stringfield
 Director,
Office of Federal Advisory Committee Policy
Bldg. 31, Room 3B59
(301) 496-2123; Fax (301) 402-1567
E mail: LS34v@nih.gov <mailto:LS34v@nih.gov>

-----Original Message-----
From: Sanchez, Nestor [SMTP:nxs8@cdc.gov] <mailto:[SMTP:nxs8@cdc.gov]>
Sent: Wednesday, March 29, 2000 11:08 AM
To:   Stringfield, Laverne (NIH)
Cc:   Burch, Burma
Subject:    FW: facacomments00
Laverne:    These are the official comments from the CDC Office of General
Counsel
 >  -----Original Message-----
 > From:    Tress, Deborah W.
 > Sent:    Friday, March 03, 2000 4:27 PM
 > To:      Sanchez, Nestor; Armstrong, Mary M.
 > Cc:      Kocher, Paula L.; Malone, Kevin M.
 > Subject: facacomments00
 >
 > Nestor/Mary:  Attached are comments on the FACA reg. from me and Kevin.
 > PLease forward through whatever channels you think are appropriate. >
 Thanks, Deb & Kevin.
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 >  <<facacomments00.doc>>  <<facacomments00.doc>>

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Nestor; Armstrong, Mary M.</FONT>

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L.; Malone, Kevin M.</FONT>

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FACE=3D"Arial">Subject: =
facacomments00</FONT>

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COLOR=3D"#0000FF" SIZE=3D2 FACE=3D"Arial">Nestor/Mary: Attached =
are comments on the FACA reg. from me and Kevin.</FONT>

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COLOR=3D"#0000FF" SIZE=3D2 FACE=3D"Arial">PLease forward through =
whatever channels you think are appropriate.</FONT>

<FONT COLOR=3D"#0000FF" SIZE=3D2 FACE=3D"Arial">></FONT> <FONT =
COLOR=3D"#0000FF" SIZE=3D2 FACE=3D"Arial">Thanks, Deb & =
Kevin.</FONT>

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- facacomments00.doc

Comments on the General Services Administration Proposed Rule on Federal Advisory Committee Management - 41 CFR Parts 101-65 and 102-3

1. **Subcommittees §§ 102-3.30, 102-3.35, 102-3.170, and 102-3.185** - We appreciate the clarification of the status of, and requirements related to, subcommittees that report to chartered advisory committees. The proposed language is more consistent with the statutory language than the existing rule. A couple of points however, still require clarification. First, although the preamble states on page 2504 that a subcommittee that reports to a parent committee is not an advisory committee, meetings of a subcommittee are included under the definition of "committee meeting." The language of §102-3.185 seems to imply that such committees are covered by the Act, but may be exempted from the notice and open meeting requirements of the Act when conducting the activities listed. It is also not clear what record-keeping requirements are related to subcommittee activities that are not subject to notice and openness requirements. Finally, does the definition of "subcommittee" in § 102-3.30 mean that individuals can be appointed as members of subcommittees who are not members of the full committee?

2. **Utilized § 102-3.35(c)** - Generally this section is clear and better reflects the current state of FACA caselaw. However, the language in the parenthesis seems to imply that an agency could simply contract with an outside party to establish an advisory committee to advise the agency. Please clarify the intent of this statement.

   Please also comment on the applicability of FACA to collaborations between federal agencies and outside groups. Often in the context of collaborative activities, groups comprising federal and non-federal employees meet to basically advise each other on the implementation of the collaborative activity.

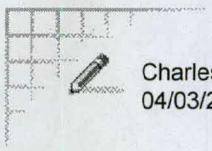
3. **Appointment of members §§ 102-3.15(c) and 102-3.150** - This language is helpful to clarify that appointment of members is at the discretion of the agency head, subject to the balance requirements. The chart indicates that the solicitation of nominations may be part of the process, but is not required. Does GSA have an opinion on the appropriate role of the existing advisory committee members in identifying and advising on the selection of new members?

4. **Pay and travel expenses for members and consultants §102-3.155** - Sub-section (i) of §102-3.150 states that travel expenses may be paid for "committee members" and "staff members" we assume this would not preclude the payment of travel expenses of consultants. The "Guidance" provided in the chart on page 2516 is a little confusing in section II. A. It is our agency's practice to appoint committee members as Special Government Employees and to compensate them accordingly. This "Guidance" seems to imply that appointing members as consultants is the only way to provide compensation. It is not clear how this discussion relates to the Guidance on the next page III.B on "representatives" v. "Special Government Employees." Also, is it accurate to say that there are two uses of consultants related to advisory committees? First, members can be appointed as consultants rather than as SGE's, and second, that consultants can be procured to assist the committee membership in addressing particular issues.

5. **Recordkeeping §102-3.190(d)** - The Federal Advisory Committee Act §10(b) states that "Subject to section 552 of title 5, United States Code (*the Freedom of Information Act (FOIA)*) the records...made available to or prepared for or by each advisory committee shall be available for public inspection and copying..." Please clarify the extent to which the exemptions from release under FOIA may be applied to advisory committee documents. This reference to FOIA is not included in the proposed regulation. For example, if a draft agency document is provided to advisory committee members for review and comment, can that document be withheld either from the public attendees at the meeting or from subsequent FOIA requestors? Further, what, if any, would be the recordkeeping requirements related to a subcommittee exempt from the notice and openness requirements that reports to a full committee. Particularly, would notes, drafts, etc. be

required to be included in the committee's official records? Finally, must draft advisory committee documents be released prior to being finalized if they are not released

6. **Notice §102-3.175** - On some occasions, advisory committee consultation is necessary on an emergency basis that may not allow for 15 day advance Federal Register notice. The regulation does not seem to allow for any type of emergent exception to the 15 day notice as allowed by the current regulations. It would also be helpful to allow for alternative means of notice when urgent circumstances do not allow for timely publication in the Federal Register. Notice would still be provided in the Federal Register as quickly as possible prior to, or immediately following, the meeting. Please clarify.



Charles F. Howton
04/03/2000 07:11 PM

#F18

To: James L. Dean/MC/CO/GSA/GOV@GSA, Deborah F. Connors/MC/CO/GSA/GOV@GSA, editor@webdelsol.com
cc: stringfl@od.nih.gov

Subject: Comments to Proposed Rule

Comment #F18

DC -- hardcopy in your in-box.

MN -- for website.

LaVerne -- thanks again. Edited for format consistency. Will forward copy to Marie/Ellen at HHS.

---------- Forwarded by Charles F. Howton/MC/CO/GSA/GOV on 04/03/2000 09:37 AM ----------

From: "Stringfield LaVerne Y. (OD)" <StringfL@OD.NIH.GOV> AT internet on 03/30/2000 03:06 PM

To: Charles F. Howton/MC/CO/GSA/GOV
cc:

Subject: Comments to Proposed Rule

Comments from the Centers for Disease Control and Prevention, HHS.

Regarding subcommittees, on page 2508 under section 102-3.30, subcommittee is defined as "a group that reports to a chartered advisory committee and not directly to the agency, whether or not its members are drawn in whole or in part from the parent committee." On page 2505, it states that "GSA agrees that agencies should assure that subcommittees are appropriately reporting to agency officials through their parent committees." However, on page 2519, section 102-3.200, "Key points and principles," the table reads "subcommittees that report to a parent committee, and not directly to a Federal official, need not open their sessions to the public or comply with the Act's procedures for announcing meetings." Does this mean, then, that subcommittees can report directly to Federal officials and not to parent committees, and are subcommittees reporting directly to a Federal official subject to FACA?

Helen Kuykendall
CDC Committee Management Specialist

3/14/00

#F10

From: "Abraham Georgia" <GAbraham@comdt.uscg.mil> AT internet on 03/14/2000 03:45 PM

To: Charles F. Howton/MC/CO/GSA/GOV

cc:

Subject: Comments on Proposed Rule

Mr. Howton:

The attached file is Coast Guard's comments on GSA's proposed rule amending the regulations governing the implementation of the Federal Advisory Committee Act. A hard copy will follow.

<<GSA FACA RULE AMENDMENTS.doc>>

Georgia C. Abraham
Group Federal Officer
U. S. Coast Guard
G-CQM, Room 2219
(202) 267-6931
(202) 267-4849 fax
gabraham@comdt.uscg.mil

 - GSA FACA RULE AMENDMENTS.doc

Commandant
U. S. Coast Guard

2100 Second Street, SW
Washington, DC 20593-0001
Staff Symbol: G-CQM
Phone: 202-267-6931
FAX: 202-267-4849

5420
(dated March 14, 2000)

Mr. Charles F. Howton
General Services Administration
Office of Governmentwide Policy
Committee Management Secretariat (MC)
1800 F. Street, NW (Room G-230)
Washington, DC 20405

ADVANCE COPY

Dear Mr. Howton:

This is in response to General Services Administration request for comments on its proposed rule, published in the January 14, 2000, issue of the Federal Register (Vol. 65, No. 10, page 2504), revising 41 CFR Parts 101-6 and 102-3, Federal Property Management Regulations coverage on Federal advisory committee management. In general, this proposed revision will greatly clarify and improve the usability of these regulations. Our comments on specific sections follow.

Key Points and Principles Tables: The Key Points and Principles tables at the end of each subpart are useful. However, when there is more than one question in a Key Point and Principle, the numbering and lettering systems in the Questions and Guidance columns can be confusing. We suggest this system be better aligned between the last two columns for clarity. For example, when a guidance point answers more than one question, the question numbers to be answered could be listed immediately before the appropriate response.

Section 102-3.340 Key points and principles, Key point V. Advisory committees established under FACA may perform advisory functions only. Section 102-3.15(e) The guidance provided in the first unlettered paragraph states that: "Agencies are responsible for determining whether or not a committee is "operational" and therefore, not subject to FACA." However, the guidance in paragraph A suggests a number of conditions that have to be met before a group can be operational, including Congressional action, appointments by the President, a legal relationship with an agency, and a dedicated budget. All of these conditions are outside an agency's control. If the conditions in paragraph A are conditions that must be used by an agency in determining whether a committee is operational, this should be clarified. We suggest wording such as "Using the criteria in paragraph A below, agencies are responsible for determining whether or not a committee is "operational" and therefore, not subject to FACA." Additionally, it may also be appropriate to reference this guidance to section 102-3.35(k) *Operational committees.*

Section 102-3.110, page 2514: The acronym "DFO" is undefined until its use in section 102-3.140. We recommend "Designated Federal Officer (DFO)" in this first usage. Also, in paragraph (a), first sentence, fifth line, "...available to support related to committee activities," we recommend deleting the word "to" after "related" for clarity.

Section 102-3.170, page 2517: In the second sentence of paragraph (a) after the word "later," the word "by" should be changed to "be".

Sincerely,

/S/
T. W. JOSIAH
Vice Admiral, U. S. Coast Guard
Chief of Staff

Oct 3/13/00

#55

From: "Stringfield LaVerne Y. (OD)" <StringfL@OD.NIH.GOV> AT internet on 03/13/2000 09:34 AM

To: Charles F. Howton/MC/CO/GSA/GOV
cc:

Subject: RE: comment on proposed FACA rule

Thanks Chuck. As we discussed, this is our primary concern as well. In the past, when distinguishing our non-FACA committees from FACA groups, consensus advice has been a major barometer. It would be helpful to have more clarity on "de-emphasizing consensus advice" and examples provided. It would also be helpful to post on CMS' website the legal cases cited related to this issue.

Just a few editorial changes recommended:
Page 2509, (h) Local civic groups: Second line: 'croup' should be corrected to 'group.'
Page 2518, first line, last word: 'by' should be corrected to 'be.'
(recommendations that could later be adopted....)

LaVerne Stringfield
Director,
Office of Federal Advisory Committee Policy
Bldg. 31, Room 3B59
(301) 496-2123; Fax (301) 402-1567
E mail: LS34v@nih.gov <mailto:LS34v@nih.gov>

-----Original Message-----
From: charles.howton@gsa.gov [SMTP:charles.howton@gsa.gov]
Sent: Friday, March 10, 2000 6:44 PM
To: mabsher@os.dhhs.gov
Cc: ewashin1@os.dhhs.gov; Stringfield, LaVerne Y. (OD); james.dean@gsa.gov
Subject: comment on proposed FACA rule

fyi
---------- Forwarded by Charles F. Howton/MC/CO/GSA/GOV on 03/10/2000 06:40 PM ----------

From: <jdavis2@os.dhhs.gov> AT internet on 03/10/2000 01:22 PM

To: Charles F. Howton/MC/CO/GSA/GOV
cc: "Steven Ottenstein" <sottenst@os.dhhs.gov> AT internet@ccMTA-GEMS-MTA-01, "tw" <tw%ogc.bal%os.dc@os.dhhs.gov> AT internet@ccMTA-GEMS-MTA-01

Subject: comment on proposed FACA rule

Mr. Howton: This message is in response to the notice at 65 FR 2504

concerning the proposed rule for Federal Advisory Committee Managment.

It would be helpful if proposed section 102-3.35 included an example similar to section 101-6.1004(l) in the existing rule for "any meeting with a group initiated by the President or one or more Federal offical(s) for the purpose of exchanging facts or information." Federal agencies often rely upon this exception in the current rules, which derives from the fact that exchanging information is not the same as obtaining "advice and recommendations." There is potential for confusion because the proposed regulation puts emphasis on whether a group is "utilized," and the government will often "exercise actual management and control" over a group, and therefore utilize it, for the benign purpose of exchanging facts or information.

Jeff Davis, Chief, Administrative Law Branch, Business & Administrative Law Division, DHHS

MAR 14 2000

UNITED STATES DEPARTMENT OF COMMERCE
Office of the General Counsel
Washington, D.C. 20230

#F13

Charles F. Howton
Deputy Director
Committee Management Secretariat
General Services Administration
1800 F Street, Room G-230
Washington, D.C. 20405

Dear Mr. Howton:

This provides the Department of Commerce's comments on the General Services Administration's (GSA) proposed revision to 41 CFR Part 101-6, implementing the Federal Advisory Committee Act (5 U.S.C. App. 2) (FACA). On balance, the revisions are useful and appropriate. We object, however, to one proposed revision, discussed below:

Current 41 CFR 101-6.1004(j) excludes from the FACA's coverage:

> Any meeting initiated by a Federal official(s) with more than one individual for the purpose of obtaining the advice of individual attendees and not for the purpose of utilizing the group to obtain consensus advice or recommendations. However, agencies should be aware that such a group would be covered under the [FACA] when an agency accepts the group's deliberations as a source of consensus advice or recommendations.

The rationale for this exclusion appears to be that the FACA is not triggered in such cases because the agency receives only individual and not consensus advice. This exclusion has been used many times by Department of Commerce officials at all levels to obtain information from several individuals in a single meeting without obtaining consensus advice. It is a useful method for obtaining input from multiple individuals while conserving time and other valuable resources.

Proposed 41 CFR 102-3.35(e) would exclude from the FACA and the regulations' coverage:

> Groups assembled to provide individual advice. Any meeting initiated by the President or Federal official(s) with more than one individual to obtain the advice of individual attendees. <u>However, agencies should be aware that such a group would be covered by the [FACA] if it is utilized within the meaning of this part.</u>

Emphasis added.

This provision combines two distinct rationales for excluding a group from the FACA's coverage: (1) groups that do not, in fact, provide consensus advice or recommendations do not fall under the FACA; and (2) groups that are not managed or controlled by a Government agency do not fall under the FACA.

Under the first rationale, it does not matter whether an agency manages or controls the meeting so long as consensus advice is not provided. This was the case in Natural Resources Defense Council, Inc. v. Herrington, 637 F. Supp. 116 (D.D.C. 1986), in which a group of experts was convened to participate in a panel, but worked independently and submitted independent reports. There, the Secretary of Energy invited six experts to assist the agency in examining the safety of a Government-owned nuclear reactor. The Secretary issued the invitations (after apparently having selected the experts), set the topic to be discussed, scheduled the meetings, and provided staff to act as a liaison between the Department and the scientists. The scientists were even organized into a quasi-collegial body, with a "Chair" and a "Vice-Chair". Notwithstanding all these indicia of management and control (which are the hallmark of a "utilized committee" when consensus advice is provided), the District Court for the District of Columbia determined that the group was not subject to the FACA because it did not, in fact, provide consensus advice and recommendations. Under the second rationale, it does not matter if consensus advice is provided, so long as the agency does not manage or control the group. This was the case in Public Citizen v. U.S. Department of Justice, 491 U.S. 440 (1989), in which the American Bar Association provided consensus advice to the Department of Justice on judicial nominees.

By combining these two rationales, GSA has proposed a standard for exemption from the FACA's coverage that many agencies, including the Department of Commerce, will find unworkable and which imposes a standard for the FACA's applicability which the statute and interpretative case law does not require. If implemented, this would mean that any meeting of individuals for the purpose of obtaining the views of each individual would be excluded from the FACA only as long as the Department exerts no management or control over the meeting. This would seriously affect the Department's ability to hold such meetings, since, under existing procedures, Department officials frequently call the meetings, select the attendees, set the agenda, and conduct the discussion. Such activities could be viewed as asserting "management and control" for the purpose of establishing a "utilized committee". If so, the proposed revision would seriously hamper the ability of the Department to assemble groups of individuals to hear their individual views.

We urge GSA to amend the proposed provision cited above to omit the third sentence concerning "utilized" committees.

Further, we also note that the "question and answer" tables pose questions but frequently do not answer them. Rather, reference is made to the relevant provision of the regulations. GSA should provide short answers to the questions and direct readers to the relevant provisions for further guidance.

Sincerely,

(b) (6)

Barbara S. Fredericks
Assistant General Counsel
for Administration

cc: Linda J. Bilmes

Oht 3/21/00

#F15

From: <vicki_vickers@ch.doe.gov> AT internet on 03/21/2000 04:37 PM

To: Charles F. Howton/MC/CO/GSA/GOV

cc:

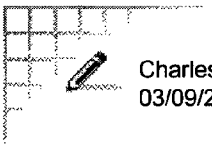
Subject: Comment on Notice of Proposed Rulemakingf, FACA, 65 FR 2504

The following comment is submitted by the U.S. Department of Energy's Chicago Operations Office in response to the proposed rulemaking published in the Federal Register on January 14, 2000, revising GSA's coverage on Federal Advisory Committee Management.

Section 102-3.40, Key points and principles chart, Row I, definition of "utilized", fourth column entitled "Guidance", Paragraph B. The second sentence of this paragraph is vague. It is suggested that more meaningful, direct, language be used, e.g., [A]ffirmative responses to the above factors indicate the possibility that an agency may be exercising actual management and control of the committee. If these factors are answered affirmatively, the agency should consider why its role in the operation of the committee does not constitute actual management and control."

If you have any questions regarding this comment, please contact Vicki Vickers by telephone at 630/252-2622 or by e-mail at vicki.vickers@ch.doe.gov.

#F3



Charles F. Howton
03/09/2000 09:29 AM

To:
cc:

Subject: GSA Proposed Rule on Federal Advisory Committee Management

---------- Forwarded by Charles F. Howton/MC/CO/GSA/GOV on 03/09/2000 09:26 AM ----------

From: "Fede Roberta" <Roberta.Fede@ost.dot.gov> AT internet on 03/06/2000 05:56 PM

To: Charles F. Howton/MC/CO/GSA/GOV
cc: "Williams Jamie" <Jamie.Williams@ost.dot.gov> AT internet@ccMTA-GEMS-MTA-01, "Smith Jeanne" <Jeanne.Smith@ost.dot.gov> AT internet@ccMTA-GEMS-MTA-01, "Abraham Georgia<USCG>" <GAbraham@comdt.uscg.mil> AT internet@ccMTA-GEMS-MTA-01, "Radloff Gwyneth" <Gwyneth.Radloff@ost.dot.gov> AT internet@ccMTA-GEMS-MTA-01

Subject: GSA Proposed Rule on Federal Advisory Committee Management

---

Reference: Section 201-3.125, p. 2517

On behalf of the Department of Transportation, I question why an organization may not be named to an advisory committee. The Department sponsors a number of advisory committees to which member organizations are named, especially Federal Aviation Administration sponsored advisory committees. Each member organization names a person to represent them on the committee, and in the case of large rulemaking committees, that representation may change as the need for particular expertise on a rulemaking issue changes.

The Department's standard policy is to name organizations to regulatory negotiation advisory committees. They, in turn name a specific person to represent them. The Department is concerned that particular interest groups/affected parties be represented, but does not feel the need to select the particular person within an interest group who would best represent that group's views.

Distl 3/20/00

#F14

From: "Mounts Gloria" <Gloria_Mounts@ed.gov> AT internet on 03/17/2000 05:34 PM

To: Charles F. Howton/MC/CO/GSA/GOV, Kennett F. Fussell Jr./MC/CO/GSA/GOV

cc:

Subject: FW: my comments on the proposed regs

Here are some comments made by one of my DFO's.

Gloria Mounts
Acting Committee Management Officer
Office of Intergovernmental and Interagency Affairs
U.S. Department of Education
400 Maryland Avenue, SW, Room 5E330
Washington, DC 20202
Phone: 202-401-3677
Fax: 202-401-1971
e-mail: gloria_mounts@ed.gov

> -----Original Message-----
> From: LeBold, Bonnie
> Sent: Thursday, March 09, 2000 5:42 PM
> To: Mounts, Gloria
> Cc: Phelps, Marianne
> Subject: my comments on the proposed regs
>
> Gloria -
>
> As requested, I reviewed the proposed FACA regulations. Attached are my > comments. Do you want me to forward them directly to GSA, or are you
> compiling comments
> from all the DFO's and then sending them on?
>
>
> <<FACAcomments.doc>>
>
> Bonnie
> 219-7009

 - FACAcomments.doc

Comments on Proposed Rule governing Federal Advisory Committee Management, published in the FEDERAL REGISTER on January 14, 2000

1. Overall, the regulations, thanks to the "plain language" style, are much easier to understand than the current regulations. Thank you for writing them in a more consumer-friendly format.

2. I found the preamble discussion regarding subcommittees (page 2504, third column, third paragraph) to be somewhat misleading. The last sentence in that paragraph states that, "Because a subcommittee which reports to a parent committee is not an 'advisory committee' under FACA, there is no legal basis for applying any of FACA's requirements to such a subcommittee." However, Section 102-3.170 states that, "If subcommittees conduct deliberations that lead to advice or recommendations that could later [be] adopted by their parent committee without further deliberations, such meetings should be subject to all openness and recordkeeping policies of this subpart." I recommend modifying the preamble language so that it accurately reflects when FACA is applicable to subcommittees, as described in Section 102-3.170.

3. On page 2507, under Section 102-3.15(a) *Determination of need in the public interest* - I think the first sentence should be modified to read, "A **non-discretionary** advisory committee may be established only when it is essential to the conduct of agency business." With a non-discretionary advisory committee, either Congress or the President has already made the determination of need in the public interest.

4. On page 2509, under 102-3.35(e) *Groups assembled to provide individual advice* – The sentence beginning with "However, agencies should be aware..." needs to be expanded to provide an example or additional details. I think Example II in the chart under Section 102-3.40 illustrates when the exclusion in (e) would apply, but perhaps there needs to be an example that illustrates when this exclusion would not apply because the group is being "utilized" within the meaning of this part.

5. On page 2512, Subpart C - Section 102-3.70 states that an advisory committee automatically terminates 2 years after its date of establishment unless the statutory authority used to establish the advisory committee provides a different duration. If the duration is greater than 2 years, can a charter be established to cover the entire period of duration specified in the statute? If so, that would be a welcome change from the current regulations that require the charter to be renewed every 2 years. The proposed regulations are not clear on this matter.

6. On page 2518, Section 102-3.185 discusses what activities are not subject to notice and open meeting requirements. Would sessions in which Department staff members provide training for committee members be considered *committee pre-deliberative work*?

3/14/00

#F12

From: <Sherer.Tim@epamail.epa.gov> AT internet on 03/14/2000 07:06 PM

To: Charles F. Howton/MC/CO/GSA/GOV

cc: Hardy.Clarence@epamail.epa.gov AT internet@ccMTA-GEMS-MTA-01, Schisler.Gordon@epamail.epa.gov AT internet@ccMTA-GEMS-MTA-01, Ellis.Vicki@epamail.epa.gov AT internet@ccMTA-GEMS-MTA-01

Subject: GSA Proposed Rule

Please see the attached, which responds to your Federal Register Notice of January 14, 2000.

(See attached file: Mar14,00GSAcomments.wpd)

- Mar14,00GSAcomments.wpd

March 14, 2000

Mr. Charles F. Howton
Deputy Director, Committee Management Secretariat
General Services Administration
1800 F Street NW
Washington, D.C. 20405

Dear Mr. Howton:

This letter is in response to your Federal Register Notice on January 14, 2000 entitled, " Federal Advisory Committee Management; Proposed Rule." As the Environmental Protection Agency's (EPA) office responsible for the oversight and policy of EPA's federal advisory committees, the proposed rule was distributed to all Agency Designated Federal Officials and applicable senior Agency officials. In this distribution, the option was provided to coordinate responses with our office, or send responses directly to the General Services Administration. This response is the coordinated response from EPA. However, you may receive additional responses from individual EPA offices.

We welcome the revisions contained in the proposed rule and have no comments that would recommend a change. The new flexibility in the proposed rule is particularly welcome. Our objective now is to develop EPA policy on federal advisory committees that (a) reflects the goals of the Agency, including the goal of, "Expansion of Americans' Right to Know About Their Environment," and (b) incorporates this new flexibility.

Sincerely,

Timothy O. Sherer
Program Manager
EPA Federal Advisory Committee Management

March 22, 2000

Mr. Charles F. Howton
Deputy Director, Committee Management
Secretariat
General Services Administration
1800 F Street, NW
Washington, D.C. 20405

Dear Mr. Howton:

I am offering comments on the proposed General Services Administration (GSA) regulations covering the implementation of the Federal Advisory Committee Act (FACA). These comments are offered from the Office of the Science Advisory Board (OSAB) at the U.S. Environmental Protection Agency (USEPA)and are independent from the comments offered on behalf of the Agency, per se. In filing these comments in this way, I am availing myself of the opportunity provided by the overseers FACA activities at USEPA (i.e., the Office of Cooperative Environmental Management (OCEM)) to file separate comments, if we so chose.

BACKGROUND ON THE SAB

The USEPA Science Advisory Board (SAB) is one of the largest FACA operations in our Agency and one of the larger such groups in the government. The SAB was mandated by Congress in 1978 and currently consists of ten distinct Committees, two of which are separately chartered (and are, therefore, Tier I committees in their own right) and eight of which are Tier II committees. The Tier II committees report to the Administrator through the SAB Executive Committee (EC), which functions as the Tier I committee carrying out the Congressional mandate.

The SAB consists of roughly 100 members, appointed by the Administrator, populating the ten committees and the EC. In addition, the work of the Board is supported through the participation of 350+ Consultants, who serve on an ad hoc basis and are appointed by myself. Collectively, the committees of the Board meet 40+ times per year in publicly announced and

accessible gatherings and generate roughly 30 reports per year.

In recent years the SAB has intentionally reached out to other FACA committees, both inside and outside of USEPA, to broaden the range of advisory expertise that can be brought to bear on a problem and to address the problem in a more holistic fashion. This experience has demonstrated that there are, not surprisingly, differences in the way that FACA committees function.

COMMENTS ON THE PROPOSED REGULATION

My concerns are presented below in two groups: a) those that have government-wide implications, and b) those that have special implications to the USEPA and the SAB.

Concerns that have government-wide implications

1. The underlying rationale of the regulation.

The preamble to the proposed regulation notes that the regulation is being revised in order to clearly state that subcommittees that report to FACA committees are not subject to FACA. The preamble notes that the current regulation, which stated explicitly that subcommittees are subject to all provisions of FACA except the requirement for a charter, "is problematic for two reasons. First, it applies FACA more broadly than the statute itself requires. Second, it essentially creates a special type of advisory committee that is subject to some, but not all, of FACA's requirements." (This latter condition is referred to as "FACA Lite.")

The regulation then takes the position that subcommittees are not subject to the requirements of FACA and thus do not require a charter, may hold closed meetings, need not release internal working papers, etc. And yet, many of the subcommittees could meet the tests posed in the regulation for a FACA committee that is "managed and operated" by an Agency; i.e.,

(a) The Agency appoints the members to the subcommittee
(b) The Agency provides the support for the subcommittee
(c) The Agency sets the agenda for the subcommittee.

To further complicate matters, the proposed regulation defines "subcommittee" so as to allow subcommittees to consider of persons totally distinct from the members of the parent committee. This situation represents an unexplained change from the current regulations and does not seem consistent with the common understanding of the term "subcommittee."

This set of facts, by themselves, does not appear to provide a directing rationale for removing FACA-like requirements from such subcommittees. The same set of facts could be used to argue that such subcommittees should each have its own FACA charter (thereby resolving the problems of applying some, but not all, of FACA's requirements to subcommittees) or that the FACA charter of the parent body could/should serve as an umbrella for true subcommittees of the body, as well. I understand that the latter is the current "FACA lite" position.

2. The untoward consequences of the regulation.

To paraphrase Robert Frost, "There's something that doesn't like an open meeting." Our experience at the SAB and the pre-FACA history in the government testifies to the fact that there is an inherent inclination in many quarters toward decreasing -- not increasing -- the openness of the advisory committee process. These inclinations are usually not malicious, conspiratorial, or even intentional. For example, Committee members sometimes prefer to work out their differences in private; Agency offices sometimes prefer to conduct "more efficient" processes; etc.

The effect of the proposed regulation is to give in to those inclinations in such a way that the opportunity for substantive observation of, let alone input to, the process by the public would be reduced. At the same time, by making it possible to pull the veil over many operations that are -- or should be -- open under the current regulation, the proposed regulation would inadvertently regenerate the "shade in which strange things can grow" that characterized conditions in the pre-FACA days.

In short, the proposal seems to be addressing the non-problem of having too many open meetings. However, I suspect that the government has rarely been sued for having too many open meetings. Rather, this proposal permits the removal of subcommittee deliberations from the public view, a position that appears to be in conflict with the intent of FACA and appears to invite litigation.

3. The schizophrenic nature of the regulation.

The intent of the proposal is to clarify what is and what is not a FACA committee. The draft language early and boldly states that "Subcommittees reporting to a parent committee are not subject to FACA." However, there is so much conditional, suggestive, and equivocal language scattered throughout the remainder of the document[1] that the stage is set for even greater confusion on the part of agencies about what types of activities

are or are not subject to FACA.

In short, the proposal falls short of its goal of clarifying the situation.

4. The definition of a subcommittee and associated implications.

The reader should be warned that the definition of a subcommittee, as used in the proposal, is not consistent with the common use of the term. In contrast with the current regulation, the proposal admits the possibility of a "subcommittee" that has no overlapping membership with the parent body at all[2]. It is hard for me to imagine a circumstance that would benefit from such an arrangement, particularly if such a group is not held to the FACA standards of openness. Further, the proposal appears to be silent about who appoints the subcommittee; i.e., the Agency of the parent committee.

A further consequence of concluding that subcommittees are not subject to FACA standards is that the materials provided to or prepared by/for the subcommittee would not necessarily be made available to the public. Rather, only products of the subcommittee destined for the parent advisory committee would be subject to the recordkeeping (and document availability) requirements of FACA.

In short, the proposed regulation appears to have the potential for some unseemly activity; e.g., establishing a subcommittee that does its substantive work under a veil and has its efforts approved in a rubber stamp session of a "shell FACA."

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[1]For example, the preamble states that "because a subcommittee which reports to a parent committee is not an "advisory committee" under FACA, there is no legal basis for applying any of FACA's requirements to such a subcommittee." The proposed regulation goes on to say, however, that "if subcommittees conduct deliberations that lead to advice or recommendations that could later be adopted by their parent committee without further deliberations, such meetings should be subject to all openness and recordkeeping policies of this subpart." (102-3.170). Then, at 102-3.200, the proposed regulation cautions that agencies should not exclude the public from subcommittee meetings because "such exclusions would run counter to FACA's provisions requiring contemporaneous access to the committee deliberative process." (FACA section 10?).

[2]The current regulation doesn't define "subcommittee" although under the current 101-6.1007(b)(4), there is a de facto definition of subcommittee as "subcommittee of a chartered advisory committee, whether its members are drawn in whole or in part from the full or parent advisory committee".

The definition of "subcommittee" in the proposed regulation, however, indicates that the subcommittee need not share any membership with the parent committee: "Subcommittee means a group that reports to a chartered advisory committee and not directly to the Agency, whether *or not* its members are drawn in whole or in part from the parent committee."

Certainly, this is not the intent of the proposed regulation; however, it does seem to admit this possibility.

5. Given the rapid growth in electronic means of communication, including the ability to hold "virtual meetings" via the Internet, the regulation is strangely silent on providing guidance on the application of FACA to these types of communication, which are already evident in the FACA operations across the government. Issues relating to recordkeeping, public access, availability of drafts, DFO responsibilities, etc. will have to be treated in the near term, as society becomes more Web-oriented.

Concerns that have special implications to the USEPA and the SAB

1. The inconsistent and fragile nature of the "more stringent than . . . " strategy.

I understand that, even when the proposal becomes effective, it will be Agency policy to maintain the current practice of subcommittees operating in a FACA-lite fashion; i.e., publicly announced and accessible meetings, timely minutes, accepting public input, etc.

At the same time, we need to recognize that:

(a) This strategy invites wider disparity in FACA operations between different agencies, who will likely adopt different policies. The result will be less consistency across the government -regarding public access, public input, accountability, etc., thereby setting the stage for the characterization of "white hat" agencies and "black hat" agencies.
(b) Agency policy much easier to change than is a governmentwide regulation, as it should be. The question is whether the issue at hand -- the underlying principles of FACA -- should be subject to such changes.

2. Appointment and Status of Members of subcommittees.

Currently, most of the SAB Members are Members of Tier II committees. Would they still be Members under the proposed regulations? Would they continue to be appointed by the Administrator? By the Staff Director? By the Executive Committee?

The SAB has been fortunate in attracting some of the most qualified scientific talent in the country to help the Agency

address a very wide range of technical problems. Part of the motivation for this participation, I imagine, is associated with being appointed as a "Member" of the Science Advisory Board. The proposal suggests that this might no longer be the case.

3. The impact on credibility and operation of SAB.

If the SAB Tier II committees were to function according to the proposed guidelines, there would be substantial loss of credibility of the SAB process, due to the fact that the detailed, substantive aspects of the SAB's work is performed at the Tier II level. The Tier I committee -- the Executive Committee -- could not possibly have the range of expertise to cover the breadth of technical issues addressed by the Board.

If, on the other hand, the SAB Tier II committees were to become full-fledged, separately chartered FACAs, they would report directly to the Administrator, thereby lessening the effectiveness of the Executive Committee in carrying out its oversight and coordination role.

A preferred option would be to maintain the current regulation's practice of conducting the Board's Tier II committees in a FACA-like fashion, invoking the Board's overall FACA charter as the reason for such action.

CONCLUSION

I applaud the efforts of GSA to update the FACA regulations. However, I fear that the current proposal could have unintended consequences for the FACA process and for the SAB that would run counter to the goals of good government that we all share.

Sincerely,

Donald G. Barnes, Ph.D.
Staff Director
Science Advisory Board

cc: Mr. Tim Sherer, USEPA/OCEM
Mr. Hale Hawbecker, USEPA/OGC

G:\SAB\DON\FACAREGS.CMT

bcc: SAB Official File, 1400A
SAB Reading File, 1400A
Barnes Reading File, 1400A
1400A/DGBarnes/pytg/Room 6450Y/564-4543/3-22-99

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

General Counsel

March 10, 2000

Charles F. Howton, Deputy Director
Committee Management Secretariat
Office of Governmentwide Policy
General Services Administration
1800 F. St. NW, Room G-230
Washington, DC 20405

Dear Sir:

This responds to GSA's request for comments on proposed amendments to its Advisory Committee Management Rule, 65 Fed. Reg. 2504 (Jan. 14, 2000). The rule as amended would offer guidance to federal agencies, including the Federal Trade Commission, on complying with the Federal Advisory Committee Act (FACA), 5 U.S.C. App. 2. Among other things, the proposed amendments would clarify the requirements of FACA in light of recent case law.

The proposed amendments' use of examples with discussion, which is provided in chart form, is very helpful in providing a fuller picture of the requirements of the Act. The specific comments set forth below concern § 102-3.35 of the rule, which provides specific examples of committees, groups, and meetings that are not subject to FACA.[1]

Operational Committees (exclusion (k)):

Exclusion (k) explains that committees established to perform primarily operational, as opposed to advisory, functions are not subject to FACA. Chart example V, concerning operational committees, addresses two issues: the meaning of "operational" and the need for specific authority to delegate federal operational functions to a committee with non-federal members. The example sets forth a series of criteria for operational committees, many of which concern the formal posture and legal authority of the committee rather than its operational nature. As the only example addressing operational committees, example V may be read to suggest that an agency may not engage in collaborations with non-federal entities to accomplish an operation unless the listed delegation criteria are met.

We understand that this implication is not intended. To the contrary, we understand that GSA concurs with the need for agencies to use a wide variety of collaborative efforts that do not fall under FACA. Many operational collaborations between an agency and other parties do not

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[1] These comments represent the views of the Office of the General Counsel of the Federal Trade Commission, and are not necessarily those of the Commission itself or any individual Commissioner.

involve delegation issues, such as when the agency and other parties have a particular common interest and work together to achieve a common result in the interest of all. These collaborations may be either formal or informal. One example is planning a conference to be presented jointly with interested private associations.

We recommend that GSA revise the "operational committee" discussion in the chart to make clear that (1) the listed criteria relate only to formal committees whose operations include exercising federal functions in lieu of the agency, (2) collaborative groups and meetings may take place in many other forms, and (3) these groups and meetings do not fall under FACA so long as the primary purpose is operational rather than the provision of advice to the agency. The following suggested language for chart example V should accomplish this. This language includes and builds on example V as proposed.

Under "Guidance," following the introductory sentences, substitute the following:

A. Committees that are primarily operational rather than advisory in nature are not subject to the Act.

B. Nonetheless, without specific authorization by the Congress, federal functions may not be delegated to or assumed by operational committees that include non-federal members. Accordingly, a formally established operational committee with non-federal members that exercises federal functions should ordinarily have the following characteristics: [insert proposed example's list of characteristics]

C. Other forms of collaboration between the Executive Branch and others may not involve any delegation to or assumption by non-federal entities of federal functions. Such collaboration is not subject to FACA if it is primarily operational rather than primarily advisory.

Groups assembled to provide individual advice (exclusion (e)):

The proposed amendments rewrite Exclusion (e) to remove the current rule's caution about agencies accepting "consensus advice" from groups assembled to provide individual advice. In light of recent case law, this revision is helpful and appropriate. However, we recommend that the text and chart more fully reflect the case that most definitively addresses the "individual advice" concept, *Ass'n. of Amer. Physicians and Surgeons v. Clinton*, 997 F. 2d 898 (D.C. Cir. 1993). There, the court explained that FACA covers a committee providing advice "as a group." The court discussed several relevant factors in distinguishing an advisory committee acting as a group from a mere assemblage of individuals. *Id.* at 913-14. We recommend that the text adopt the court's phrase and that the examples reflect the court's explanation.

Further, the concept of "utilized" as discussed does not appear to help in determining whether a group is assembled to provide advice individually or as a group. FACA uses the term "utilized" as an alternative to "established," thereby extending coverage to an externally-created organization that the agency manages and controls as though it had established the organization

itself. When an agency initiates a meeting with several persons to obtain individual advice, rather than the advice of the group acting jointly as a group, the agency ordinarily creates the group itself, determines the participants and sets the agenda. Even so, since the group does not provide advice as a group, it is not an advisory committee. Such agency creation or control of the group and its agenda has no bearing on whether the participants act as a group or merely provide individual views.

There may be an assumption underlying the discussion of "utilized" here, that the term "established" itself (and therefore also the term "utilized") involves more than merely assembling a group of persons chosen by an agency to provide individual advice on an issue determined by the agency. The discussion may assume that an agency only "establishes" an advisory committee if it causes the participants to act with some formality as a group. If so, it may be useful for the rule to discuss that term specifically. The focus in Exclusion (e) would remain whether the assemblage of persons is providing advice as a group, which might be either established or utilized by the agency.

Finally, it would be helpful if the discussion clarifies that the exclusion of groups assembled to provide individual advice is not limited to "individuals" in the sense of "natural persons." The examples should explain that the exclusion covers an assemblage of persons representing existing organizations that provide advice from the individual organizations rather than as a committee of organizations.

These clarifications of Exclusion (e) are necessary to ensure that the rule does not create an unintended barrier to a wide variety of permitted forms of public outreach and involvement other than advisory committees. Suggested language is set forth below:

Text (revised exclusion (e)):

> (e) Groups assembled to provide individual advice. Any meeting initiated by the President or federal official(s) with more than one individual to obtain the advice of individual attendees. However, agencies should be aware that a group would be covered by the Act if the agency seeks its advice as a group.

New chart item (insert before or after current chart items II and III):

> Key points: Advice "as a group"
>
> Question: Can an agency official meet with a number of persons jointly to obtain their individual views, without violating FACA?
>
> Guidance: Yes. The Act applies only where the group is established or utilized to render advice or recommendations as a group and not as a collection of individuals; the whole must be greater than the parts. To be an advisory committee under the Act, the group must have, in large measure, an organized structure, a fixed membership, and a specific purpose. Such a group can provide a

basis of legitimacy to the advice it gives. A collection of attendees providing individual advice is not acting "as a group" under the Act. In this respect, "individual" is not limited to natural persons: where the group consists of representatives of various existing organizations, each representative may individually provide advice on behalf of his or her organization without violating FACA (assuming those organizations themselves are not managed or controlled by the agency.)

Chart items II and III should also be rewritten to conform with the comments and language above. These two items could be combined into one, since both focus on the effect of "consensus" in a public meeting in determining whether a group is subject to FACA.

GSA may also wish to revise the "key points and principles" entry on chart items III and VI. Both are now stated as "definition of an advisory committee."

An amended Committee Management rule will significantly help agencies to ensure that their activities comply with applicable requirements of FACA. We appreciate the opportunity to provide comments on this important subject. Please feel free to telephone Rachel Dawson (202-326-2463) if you have any questions concerning this comment.

Sincerely,

(b) (6)

Debra A. Valentine
General Counsel

3/13/00

#F6

From: <Grady_Towns@fws.gov> AT internet on 03/13/2000 02:49 PM

To: Charles F. Howton/MC/CO/GSA/GOV
cc: Hope_Grey@fws.gov AT internet@ccMTA-GEMS-MTA-01

Subject: Proposed Rule on Federal Advisory Committee Management

---

Dear Mr. Howton:

GSA is to be commended for providing the updated subject Proposed Rule. However, one of the complaints that we often hear is that the process for creating and managing Federal Advisory Committees often takes a very long time. Therefore, we recommend that GSA encourage Federal Agencies to streamline the process wherever possible.

Grady Towns

United States Department of the Interior

FISH AND WILDLIFE SERVICE
1875 Century Boulevard
Atlanta, Georgia 30345

IN REPLY REFER TO:

March 13, 2000

General Services Administration
Office of Governmentwide Policy
Committee Management Secretariat (MC)
1800 F Street NW (Room G-230)
Washington, DC 20405

3/21/00

Dear Sir or Madam:

This region has reviewed the proposed rule regarding Federal Advisory Committee Management and we have no comment to provide at this time.

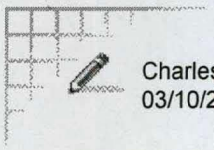
If you have any further questions, please feel to contact me at 404-679-4000, or Ruth Slette, Chief, Contracting and General Service at 404-679-4055.

Sincerely yours,

(b) (6)

"Sam D. Hamilton"
Regional Director

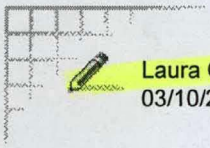
(3/22/00 - faxed to Sharon Norman, DOI cmo)



Charles F. Howton
03/10/2000 09:18 AM

To: Laura G. Smith/MVP/CO/GSA/GOV@GSA
cc:

Subject:

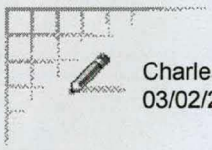


Laura G. Smith
03/10/2000 08:40 AM

To: Charles F. Howton/MC/CO/GSA/GOV@GSA
cc: William B. Davison II/MVR/CO/GSA/GOV@GSA

Subject: Proposed FACA Rule

Thank you for the opportunity to review the proposed FACA Rule. After carefully reviewing the changes, recent case law, and discussions with our attorney, we have determined that these changes will not impact our field operations, therefore, we submit a "No Comment."



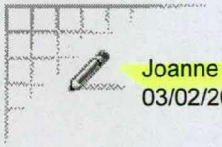
Charles F. Howton
03/02/2000 12:32 PM

To: James L. Dean/MC/CO/GSA/GOV@GSA
cc: Ivy A. Dodson/CAI/CO/GSA/GOV@GSA

Subject: Proposed FACA Rule

fyi

---------- Forwarded by Charles F. Howton/MC/CO/GSA/GOV on 03/02/2000 12:28 PM ----------



Joanne Szafran
03/02/2000 12:03 PM

To: Charles F. Howton/MC/CO/GSA/GOV@GSA
cc:

Subject: Proposed FACA Rule

Thank you for the opportunity to review the proposed Federal Advisory Committee Act Rule.

The OIG have reviewed the proposed rule and we have no comments

Joanne Szafran
202-219-0081
3/2/00

Ltr 3/1/00

Marjorie L. Lomax 03/01/2000 04:08 PM

To: Charles F. Howton/MC/CO/GSA/GOV@GSA
cc:

Subject: Proposed FACA Rule

MP has reviewed the proposed FACA rule and does not have any comments. Thanks for the opportunity to review it.

---------- Forwarded by Marjorie L. Lomax/MPE/CO/GSA/GOV on 03/01/2000 04:05 PM ----------

David L. Bibb 02/25/2000 01:15 PM

To: Marjorie L. Lomax/MPE/CO/GSA/GOV@GSA
cc:

Subject: Proposed FACA Rule

For review.

---------- Forwarded by David L. Bibb/MP/CO/GSA/GOV on 02/25/2000 01:12 PM ----------

From: William B. Davison II on 02/25/2000 01:13 PM

To: James L. Dean/MC/CO/GSA/GOV@GSA, Mary J. Mitchell/ME/CO/GSA/GOV@GSA, Frank McDonough/MG/CO/GSA/GOV@GSA, Mark G. Schoenberg/MI/CO/GSA/GOV@GSA, Joe McKay/MJ/CO/GSA/GOV@GSA, Joan C. Steyaert/MK/CO/GSA/GOV@GSA, David L. Bibb/MP/CO/GSA/GOV@GSA, Becky Rhodes/MT/CO/GSA/GOV@GSA, Les Davison/MV/CO/GSA/GOV@GSA

cc:

Subject: Proposed FACA Rule

Send comments. or no comments, to charles.howton@gsa.gov , or by fax to (202) 273-3559, with a CC to me.

Select a representative , from your organization, to review and comment

To the Deputy Associate Administrators in MK, MP, MT and MV, please forward to your Division Directors as well.

If this has already been forwarded to you, please disregard.

Thank you
Bill Davison, Clearance Officer for M

---------- Forwarded by William B. Davison II/MVR/CO/GSA/GOV on 02/25/2000 12:56 PM ----------

Ivy A. Dodson on 02/17/2000 11:24:59 AM

Delia P. Davis
02/28/2000 09:07 AM

2/28/00

To: Charles F. Howton/MC/CO/GSA/GOV@GSA
cc: William B. Davison II/MVR/CO/GSA/GOV@GSA

Subject: Proposed FACA Rule

No comment from MVE.

---------- Forwarded by Delia P. Davis/MVE/CO/GSA/GOV on 02/28/2000 09:03 AM ----------

Les Davison
02/25/2000 03:33 PM

To: James D. Adams/MVS/CO/GSA/GOV@GSA, Delia P. Davis/MVE/CO/GSA/GOV@GSA, Deborah O'Neill/MVI/CO/GSA/GOV@GSA, Edward C. Loeb/MVR/CO/GSA/GOV@GSA, Albert A. Matera/MVP/CO/GSA/GOV@GSA
cc:

Subject: Proposed FACA Rule

---------- Forwarded by Les Davison/MV/CO/GSA/GOV on 02/25/2000 03:29 PM ----------

From: William B. Davison II on 02/25/2000 01:13 PM

To: James L. Dean/MC/CO/GSA/GOV@GSA, Mary J. Mitchell/ME/CO/GSA/GOV@GSA, Frank McDonough/MG/CO/GSA/GOV@GSA, Mark G. Schoenberg/MI/CO/GSA/GOV@GSA, Joe McKay/MJ/CO/GSA/GOV@GSA, Joan C. Steyaert/MK/CO/GSA/GOV@GSA, David L. Bibb/MP/CO/GSA/GOV@GSA, Becky Rhodes/MT/CO/GSA/GOV@GSA, Les Davison/MV/CO/GSA/GOV@GSA
cc:

Subject: Proposed FACA Rule

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To the Deputy Associate Administrators in MK, MP, MT and MV, please forward to your Division Directors as well.

If this has already been forwarded to you, please disregard.

Thank you
Bill Davison, Clearance Officer for M

---------- Forwarded by William B. Davison II/MVR/CO/GSA/GOV on 02/25/2000 12:56 PM ----------

Ivy A. Dodson on 02/17/2000 11:24:59 AM

Left 2/25/00 (prev. dir. TD - did not need to become a GSA "red border" for internal clearance.)

James L. Dean 02/25/2000 02:30 PM

To: Charles F. Howton/MC/CO/GSA/GOV@GSA, Deborah F. Connors/MC/CO/GSA/GOV@GSA
cc:

Subject: Proposed FACA Rule

FYI

---------- Forwarded by James L. Dean/MC/CO/GSA/GOV on 02/25/2000 02:27 PM ----------

From: William B. Davison II on 02/25/2000 01:13 PM

To: James L. Dean/MC/CO/GSA/GOV@GSA, Mary J. Mitchell/ME/CO/GSA/GOV@GSA, Frank McDonough/MG/CO/GSA/GOV@GSA, Mark G. Schoenberg/MI/CO/GSA/GOV@GSA, Joe McKay/MJ/CO/GSA/GOV@GSA, Joan C. Steyaert/MK/CO/GSA/GOV@GSA, David L. Bibb/MP/CO/GSA/GOV@GSA, Becky Rhodes/MT/CO/GSA/GOV@GSA, Les Davison/MV/CO/GSA/GOV@GSA
cc:

Subject: Proposed FACA Rule

Send comments. or no comments, to charles.howton@gsa.gov , or by fax to (202) 273-3559, with a CC to me.

Select a representative , from your organization, to review and comment

To the Deputy Associate Administrators in MK, MP, MT and MV, please forward to your Division Directors as well.

If this has already been forwarded to you, please disregard.

Thank you
Bill Davison, Clearance Officer for M

---------- Forwarded by William B. Davison II/MVR/CO/GSA/GOV on 02/25/2000 12:56 PM ----------

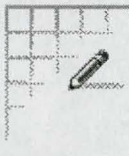
Ivy A. Dodson on 02/17/2000 11:24:59 AM

To: Eric M. Dodds/C/CO/GSA/GOV@GSA, James M. Taylor/WPS/RW/GSA/GOV@GSA, Dawn S. Linthicum/BE/CO/GSA/GOV@GSA, Mirinda D. Jackson/E/CO/GSA/GOV@GSA, Julie J. Johnson/FPP/CO/GSA/GOV@GSA, Anne M. Quigley/GA/CO/GSA/GOV@GSA, Joanne Szafran/JPFP/CO/GSA/GOV@GSA, Stephenie Foster/L/CO/GSA/GOV@GSA, Eugenia D. Ellison/LG/CO/GSA/GOV@GSA, Helen C. Maus/LG/CO/GSA/GOV@GSA, Harmon R. Eggers/LR/CO/GSA/GOV@GSA, William B. Davison II/MVR/CO/GSA/GOV@GSA, Marvin E. Saunders/PH/CO/GSA/GOV@GSA, William R. Ratchford/S/CO/GSA/GOV@GSA, Elizabeth B. Thompson/TCA/CO/GSA/GOV@GSA, Hap Connors/X/CO/GSA/GOV@GSA, Gail T. Lovelace/CP/CO/GSA/GOV@GSA, Elaine P. Dade/CA/CO/GSA/GOV@GSA, Daniel K. Cooper/CAI/CO/GSA/GOV@GSA
cc:

Subject: Proposed FACA Rule

Below is a message from the Committee Secretariat's office asking for comments on the Proposed Federal Advisory Committee Act (FACA) Rule. That office is soliciting comments from all departments and agencies within the Executive Branch and asked that Committee Management Officers forward this message within their agency. Comments may be filed at the following internet address: charles.howton@gsa.gov, or by facsimile to (202) 273-3559. The Proposed Rule can be access through the Committee Management Secretariat's home page indicated below.

---------- Forwarded by Ivy A. Dodson/CAI/CO/GSA/GOV on 02/17/2000 10:41 AM ----------



Kennett F. Fussell Jr.@GSA
02/08/2000 04:58 PM

To: Actuary@RRB.gov, afishel@fcc.gov, ALB@NRC.GOV, Angel.Ray@DO.treas.gov, Barbara_C._Alloway@hud.gov, bgibson@dol.gov, bferguson@ostp.eop.gov, armand.esposito@ssa.gov, cabenedi@opm.gov, drakev@mail.va.gov, eblum@fec.gov, ellis.vicki@epamail.epa.gov, gloria_mounts@ed.gov, ivy.dodson@gsa.gov, ewashin1@os.dhhs.gov, gilda.presley@sba.gov, gloria.cabe@exim.gov, gowerel@sa15wpoa.us-state.gov, lisa.mushaw@usda.gov, maryann.hadyka@arch2.nara.gov, matt.crouch@hq.nasa.gov, mblase@cftc.gov, mgosliner@mmc.gov, muriel.anderson@fema.gov, neermama@acda.gov, nweiss@neh.fed.us, roberta.fede@ost.dot.gov, spaethj@osd.pentagon.mil, stringfl@od.nih.gov, tbish@ios.doi.gov, vkruk1@doc.gov, ALB@NRC.GOV, comesw.fasab@gao.gov, katzj@sec.gov, kkoyne@fec.gov, mquigley@ncd.gov, plowitzk@arts.endow.gov, raggio@access-board.gov, tnash@adf.gov, kyork@nsf.gov, carol_lee.hurley@usccr.sprint.com, sharon_norman@ios.doi.gov, dcombs@oc.fda.gov, linda_wade@hud.gov, lstith@ustr.gov, pfelts@ustr.gov, rachel.samuel@hq.doe.gov, LMorton@usaid.gov, comesw.fasab@gao.gov, gcanter@neh.gov, johnnie_hodge@hud.gov, mbogdan@btgcinema.com, daniel_rader@oa.eop.gov, cabenedi@opm.gov, fjbuzzi@RRB.gov, tolson.valarie@sba.gov, starksd@stb.dot.gov, marvin.eason@mail.va.gov, linda_v._priebe@ondcp.eop.gov, plowitzk@arts.endow.gov, mgosliner@mmc.gov

cc: Charles F. Howton/MC/CO/GSA/GOV@GSA, James L. Dean/MC/CO/GSA/GOV@GSA, Margaret A. Weber/MC/CO/GSA/GOV@GSA

Subject: Proposed FACA Rule

Charles F. Howton

This is a reminder that the new GSA proposed rule on Federal Advisory Committee Management was published in the *Federal Register* on 1/14/00, at 65 FR 2504 as a notice of proposed rulemaking (NPRM). We are soliciting not only your comments as CMOs, but comments also from other interested persons in your agencies, especially those whose duties involve FACA and committee management. The comment period closes on 3/14/00.

If you have not already done so, please give the proposed rule wide distribution as soon as possible throughout your agencies, and to your external customers and stakeholders as well, to include advisory committee members. The proposed rule is available from our homepage at **http://policyworks.gov/FACA_Townhall**.

As a minimum, the proposed rule should be reviewed by all component or subagency CMOs, GFOs, and DFOs, and personnel, legal, ethics, and other support staff as appropriate. Comments and perspectives from regional or field operating personnel are desirable as well. Also, we suggest that your senior decisionmaking officials be apprised of the proposed rule as necessary.

As always, thank you for your participation and support of this critical initiative to update and streamline committee management activities and operations under FACA. We will be discussing with you the status of the development and implementation of the final rule in future communications and in upcoming Interagency Committee meetings.

Draft 2/7/00

James L. Dean 02/07/2000 08:43 AM

To: <Patrick_Boyd@blm.gov> AT internet@ccMTA-GEMS-MTA-01
cc: Charles F. Howton/MC/CO/GSA/GOV@GSA, Deborah F. Connors/MC/CO/GSA/GOV@GSA

Subject: Re: Comments on your proposed rule

Thanks, Pat. We're all looking forward to working with you. I think you'll be a great addition to the interagency team!

Jim

From: <Patrick_Boyd@blm.gov> AT internet on 02/04/2000 01:55 PM

From: <Patrick_Boyd@blm.gov> AT internet on 02/04/2000 01:55 PM
To: James L. Dean/MC/CO/GSA/GOV
cc:

Subject: Comments on your proposed rule

Jim, I asked Annetta if she had any more comments for you on the proposed rule, and she said she didn't.

I enjoyed meeting with you this morning and hope to be able to help with the final rule. PB

James L. Dean 01/14/2000 03:35 PM

To: <Burgan.Karen@epamail.epa.gov> AT internet@ccMTA-GEMS-MTA-01
cc: annetta.cheek@npr.gov AT internet@ccMTA-GEMS-MTA-01 (bcc: Charles F. Howton/MC/CO/GSA/GOV)

Subject: Re: Plain Language in FACA Reg.

Karen:

Thanks for your comments and offer of assistance. We'll take you up on it.

Your reading of the Preamble, as reflected in your version, is on-target. We have a team in place to translate any comments we receive into the Final Rule, and we would be delighted to have you join us. Debbie Connors of my staff will be in touch.

Jim

From: <Burgan.Karen@epamail.epa.gov> AT internet on 01/13/2000 04:53 PM

From: <Burgan.Karen@epamail.epa.gov> AT internet on 01/13/2000 04:53 PM

To: James L. Dean/MC/CO/GSA/GOV
cc: annetta.cheek@npr.gov AT internet@ccMTA-GEMS-MTA-01

Subject: Plain Language in FACA Reg.

Mr. Dean -

I'm the head of Communications for EPA's Office of Policy, Economics and Innovation. Annetta forwarded your FACA reg. to me and to several others who are active in plain language across government. You've plowed some very good new ground here, and we compliment your effort. But it can be even better, and we'd like to help you.

This reg. has tremendous potential for very high visibility. As you point out in the preamble, we're all involving stakeholders to a much greater extent than ever before. This reg. will be seen and used by thousands of federal employees and it could serve as a plain language model for all of government.

I understand that the proposal is going to print in the next day or so. At EPA, we've found that the "down time" while the proposal is out for comment is a good time for the reg. writers to tackle plain language issues. We've successfully done this on several rules.

The attachment is a redraft of the preamble. Since I know little about FACA requirements, I had to do some interpretation in writing it. But this is important information for you. I'm a potential user of this reg. and this is what I think the preamble says. If my interpretation isn't correct, that's a problem.

11/18/00

James L. Dean 01/14/2000 03:31 PM

To: Charles F. Howton/MC/CO/GSA/GOV@GSA, Deborah F. Connors/MC/CO/GSA/GOV@GSA
cc:

Subject: Plain Language in FACA Reg.

FYI

---------- Forwarded by James L. Dean/MC/CO/GSA/GOV on 01/14/2000 03:26 PM ----------

From: <Burgan.Karen@epamail.epa.gov> AT internet on 01/13/2000 04:53 PM

To: James L. Dean/MC/CO/GSA/GOV
cc: annetta.cheek@npr.gov AT internet@ccMTA-GEMS-MTA-01

Subject: Plain Language in FACA Reg.

Mr. Dean -

I'm the head of Communications for EPA's Office of Policy, Economics and Innovation. Annetta forwarded your FACA reg. to me and to several others who are active in plain language across government. You've plowed some very good new ground here, and we compliment your effort. But it can be even better, and we'd like to help you.

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The team of plain language experts available to help includes:
Pat Boyd - Bureau of Land Management 452-5076 (NPR?)
Rita Smith - Dept. of Energy
Carolyn Hoskinson, Environmental Protection Agency

Please let me know if we can help you make this a truly outstanding plain language reg. My phone no. is 202-260-8982, if you'd like to call rather than reply by e-mail.

information
renaissance

4/28/00

Charles F. Howton
Deputy Director
Committee Management Secretariat [MC]
General Services Administration
1800 F. Street NW [Room G-230]
Washington D.C. 20405

April 24, 2000

Dear Mr. Howton,

Re: FACA Rulemaking

Information Renaissance filed comments on the proposed Federal Advisory Committee Act regulations on March 9, 2000. While we recognize that the comment period has closed, we thought it important to bring to your attention the following example that illustrates the merits of our earlier suggestions.

In our comments we suggested that the proposed regulations should be amended to require that a web page be established for each chartered committee. Meeting notices and minutes should be posted at this site. In addition, the page should contain links to materials submitted by committee members and agency staff to the committee members for their use during deliberations. Finally, we suggested that the page should incorporate a mechanism for allowing the public to comment on the activities of the committee.

Since submitting our comments we have discovered an FTC web page for its Advisory Committee on Online Access and Security. [www.ftc.gov/acoas/index.htm]. This site serves as an excellent model for what we are advocating. The page has all the appropriate links and it makes it easy for the public to submit comments on this particular topic. The only missing feature is that all the materials are not easily searchable.

We think that this example should prompt GSA to amend its proposed rule along the lines that we suggested earlier.

Sincerely,

(b) (6)

Barbara H. Brandon

600 Grant Street Suite 2980 telephone 412.471.4636
Pittsburgh, PA 15219-2702 bhb@info-ren.org facsimile 412.471.1592

Advisory Committee on Online Access and Security

The Federal Trade Commission has established an Advisory Committee on Online Access and Security. The purpose of the Advisory Committee is to provide advice and recommendations to the Commission regarding implementation of certain fair information practices by domestic commercial Web sites. In particular, the Advisory Committee will address providing online consumers reasonable access to personal information collected from and about them and maintaining adequate security for that information.

- ***Public Comments***
  - How to Submit a Comment
- ***Draft Advisory Committee Report*** (as of April 26. 2000)
  - Introduction
  - Body of Report
- ***Draft Report Sections***
  - **Access Issues**
    - Degree of Access, and Terms and Conditions of Access
      - Summary
      - Options for the Scope of Access [PDF 62K]
    - The Entities Covered and the Ability to Correct or Edit the Data [PDF 33K]
    - Authentication and Technology Issues [PDF 30K]
  - **Security Issues** [PDF 31K]
- ***April 28th Meeting of the Advisory Committee***
  - Agenda of the Meeting
  - *Federal Register* Notice Announcing the Meeting (04/13/00) [PDF 121K]
- ***Subgroup Option Papers***
  - **Access Issues**
    - Degree of Access, and Terms and Conditions of Access
      - Theme Piece
      - Options Paper [PDF 101K]
    - The Entities Covered and the Ability to Correct or Edit the Data [PDF 182K]
    - Authentication and Technology Issues
  - **Security Issues**
    - A Continuum of Security Options
- ***March 31st Meeting of the Advisory Committee***
  - Transcript of Meeting [PDF 370K]
  - Agenda of the Meeting
  - *Federal Register* Notice Announcing the Meeting (03/16/00) [PDF 117K]
- ***Preliminary Draft Outlines of Subgroups***
  - **Access Issues**
    - Scope and Categories Subgroup Draft Outline
    - Entities Subgroup Draft Outline [PDF 15K]

    - Costs and Benefits Subgroup Draft Outline and Discussion
    - Authentication Subgroup Draft Outline [PDF 38K]
  - **Security Issues**
    - Standards Subgroup Draft Outline [PDF 16K]
    - Managerial and Technical Subgroup Draft Outline
    - Disclosures Subgroup Draft Outline [PDF 11K]

- ***February 25th Meeting of the Advisory Committee***
  - Transcript of Meeting [PDF 501K]
  - Agenda of the Meeting
  - *Federal Register* Notice Announcing the Meeting (02/10/00) [PDF 117K]
- ***Announcement of Two New Committee Members*** (02/09/00)
- ***Advisory Committe Bylaws and Operating Procedures*** (02/04/00)
- ***February 4th Meeting of the Advisory Committee***
  - Agenda of the Meeting
  - *Federal Register* Notice Announcing the Meeting (01/20/00) [PDF 117K]
  - Transcript of Meeting [PDF 220K]
- ***Advisory Committee Membership List***
- **News Release** (01/21/00)
- **List of Nominees** (01/11/00)
- ***Charter of the Federal Trade Commisson Advisory Committee on Online Access and Security***
  - Text of Charter (01/05/00)
- ***Establishment of the Federal Trade Commission Advisory Committee on Online Access and Security and Request for Nominations***
  - *Federal Register* Notice [PDF 126K](12/21/99)
  - News Release (12/16/99)
  - General Services Administration Letter Agreeing to the Establishment of the Advisory Committee (12/14/99) [PDF 76K]

Last Updated: Thursday, April 27, 2000

Oth 3/9/00

#91

From: "BHB" <bhb@info-ren.org> AT internet on 03/09/2000 11:12 AM

To: Charles F. Howton/MC/CO/GSA/GOV

cc:

Subject: Comments on the FACA Management Rules

Charles F. Howton
Deputy Director
Committee Management Secretariat

Transmission via email to charles.howton@gsa.gov

Comments on FACA Management
Rules
Rules

Dear Mr. Howton,

Enclosed please find an attached document for submission to the rulemaking docket on the January 14th proposal to amend the FACA Management rules. If there are any problems with this transmission please contact me so that I can resubmit these materials.

Sincerely,
Barbara H. Brandon
bhb@info-ren.org
412.471.4636

 - Faca comments letterhead.doc

information
renaissance

Barbara H. Brandon

Information Renaissance's Comments on the Proposed Changes to the FACA Management Rules

Information Renaissance is a Pittsburgh-based non-profit organization that has worked on using the Internet to improve public participation in governmental operations. We would like to submit the following comments on the January 14, 2000 proposal to modify the rules governing the management of federal advisory committees at 65 Fed. Reg. 2504 et seq.

This proposal should be revised to incorporate the Internet more fully into the operations of federal advisory committees. As presently drafted the proposal only mentions the Internet in passing by suggesting in Subpart D §102-3.110[d] that "agencies may wish to explore the use of the Internet to post committee information."[1] This is far too limited a vision of the Web. The General Services Administration (GSA) should expressly require agencies and their chartered committees to utilize fully the features of the Internet that permit low-cost, high-capacity, and bi--directional communications.

As GSA is undoubtedly aware, some advisory committees have been criticized as just "Beltway" phenomena with Washington-oriented memberships and agendas set by Washington-based officials.[2] The Internet can help ameliorate this criticism by broadening notification and distribution of materials. In addition the Web can be used to allow citizens from around the country to submit comments on the topics under discussion.

Using the Internet as a Notification Tool

The print version of the Federal Register has a narrow base of 13,750 subscribers nationwide.[3] This makes the Register a most ineffective meeting notification tool, especially for those committees that are interested in an outreach effort.

The limitations of the current system are well illustrated by EPA's "Drinking Waters Futures Forum." This committee has been charged with studying how to ensure a safe drinking water supply nationwide over the next 25 years and in particular how to provide public water

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Pittsburgh, PA 15219-2702 bhb@info-ren.org facsimile 412.471.1592

supplies to unconnected small populations. After publishing a notice in the Federal Register in May of 1999, the committee held a one-day public meeting in Washington on this topic.[4] Such an outreach effort was clearly inadequate given the Washington venue and the Register's severe limitations as a notification tool.[5]

The rules should be modified to require the Agency to notify interested members of the public by a listserve. In addition each agency should set up a Web page for each chartered committee where it would post meeting notices. Such steps should prove to be far more effective than the Register in notifying the public about the activities of a particular committee.

Impose a Committee Web Page Requirement

The requirement of §102-3.110[d] to practice openness should be strengthened by requiring each agency to maintain a web page for each chartered committee. Meeting notices and minutes should be posted at this site. In addition, the page should contain links to materials submitted by committee members and agency staff to the committee for use during their deliberations. Finally the page should contain a mechanism for allowing the public to comment on the activities of the committee.

These measures update the statutory provisions for open meetings and public comment at each meeting and are fully in accord with the congressional desire to allow the public to attend advisory committee meetings[6] and to comment on the proceedings.[7] The Internet, however, would empower Americans outside of Washington to participate electronically and this is fully in keeping with the statutory intent to foster open meetings and to allow the public to comment during meetings.

Many precedents exist now for requiring the implementation of these measures. For instance, the FDA used the Internet both as an archive and as a forum when it recently held public hearings on the safety of bioengineered foods. The agency has established a Web page where transcripts of these meetings are archived and they solicited public comments, which they have posted in their electronic docket room.[8]

Comparable steps to provide educational materials and to encourage the submission of comments were recently taken by the FTC and NTIA in holding a joint workshop on online

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privacy.[9] EPA has similarly created a web page for archived materials and minutes from its FACA Committee on Total Maximum Daily Loads.[10]

Next, agencies should be encouraged to post materials in HTML so that the documents can be searched electronically. While FDA has archived its bioengineereed food transcripts online, the material is not indexed and it is not searchable, making it most unlikely that the public will peruse these 1330 pages to learn more about the topic.

Finally, GSA should include language in the final preamble text that encourages agencies to use online dialogues[11] as a supplement to their advisory committee work. An asynchronous online discussion could be a most useful mechanism in this area and GSA should state that this rulemaking should not be read as a bar to such efforts in the future.

Conclusion

We think the provisions of Subpart E should be amended to require each agency to use listserves as a supplementary notification tool. Secondly, agencies should be required to establish web pages for each chartered committee where informational and educational materials could be posted online, and meeting schedules and minutes could be posted. Finally, each committee web page should allow for citizens to post comments electronically on the proceedings.

---

[1] 65 Fed. Reg. at 2514.

[2] Stephen P. Croley and William F. Funk, "The Federal Advisory Committee Act and Good Government," 14 Yale Journal of Regulation 451, 453 (1997). The authors, two law professors, had conducted a study of the Federal Advisory Committee Act for the Administrative Conference of the United States just prior to the Conference's abolition.

[3] Croley and Funk, supra, footnote 467 at 527.

[4] 64 Fed. Reg. 28,469, May 26, 1999.

[5] While the Register is now available online, this does make it an effective notification tool; broader use of listserves would do a much better and more targeted job.

[6] We recognize that FACA meetings can be closed pursuant to the rules, but the statutory norm calls for openness.

[7] Our suggestions are also supported by the policy goals set forth in the Paperwork Reduction Act Amendments of 1995. See 44 USC § 3501.

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[8] The FDA did solicit public comment on this topic at its web site and it has archived the public comments in Docket. # 99-4282 at www.fda.gov/ohrms/dockets/dockets/99n4282/99n4282.htm

[9] http://www.ntia.doc.gov/ntiahome/privacy/index.html

[10] See the FACA link at www.epa.gov/owow/tmdl/index.html.

[11] By an online dialogue, we mean a moderated, facilitated web-formatted discussion.

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Pittsburgh, PA 15219-2702 bhb@info-ren.org facsimile 412.471.1592

2/9/00

#F1

From: <jflatten@fs.fed.us> AT internet on 02/08/2000 04:41 PM

To: Charles F. Howton/MC/CO/GSA/GOV
cc:

Subject: Proposed FACA rule

In reading the proposed new rule for FACA, the big question that comes to mind is whether a Federal decisionmaker or their appointee or staff can participate as a member of a comittee that is neither controlled or managed by the Agency. I understand from the rule that the committee or group would not be subject to FACA if it is not controlled or managed by the agency, but the proposed rule is silent on actual participation in the group, as an agency representative. The example given in the chart is whether a Federal official can listen to and consider recommendations from these groups, which is very different from whether a Federal offical can actively participate as an member of the group in a collaborative process.

My other comment is that the chart is very confusing and needs to be reorganized. Thanks for the opportunity to comment.

Jan Flatten
Forest Planner and Environmental Coordinator
Okanogan Valley Office, Okanogan-Wenatchee National Forests
1240 S. Second Ave
Okanogan, WA 98840
Phone: (509) 826-3277; FAX: (509) 422-2014
email: jflatten@fs.fed.us

#F7

National Archives and Records Administration

8601 Adelphi Road
College Park, Maryland 20740-6001

MAR 14 2000

General Services Administration
Office of Governmentwide Policy
Committee Management Secretariat (MC)
Room G 230
1800 F Street NW
Washington, DC 20405
ATTN: Charles F. Howton

Dear Mr. Howton:

The National Archives and Records Administration appreciates the opportunity to comment on the proposed rule on Federal advisory committee management. We offer the following comments:

1. The draft regulations do not differentiate Presidential records from Federal records. Although NARA houses both Presidential and Federal records, the process for transfer to NARA differs depending on whether the records are Federal or Presidential.

Amend section 102-3.90(a) by adding a subsection (12) that requires that the committee charter explicitly state: "Whether the committee is Presidential or Executive agency."

2. The draft regulations direct advisory committees to schedule records following termination. We propose the following change:

Amend section 102-3.195(e) by adding the following to the last sentence and beyond: ". . . (NARA), or in accordance with the Presidential Records Act. Not later than one year before the termination of a Federal committee, a representative of the committee, in coordination with the agency's records management officer, shall contact NARA to review the process for submitting disposition schedules of the committee's records upon termination in accordance with the Federal Records and Disposal Acts, 44 USC Chaps. 29, 31, and 33. Records schedules must be submitted to NARA no later than six months before the termination of the Committee. Federal committees are encouraged to contact the records management officer for their associated Federal agency, or NARA, as soon as possible after their creation to receive guidance on how to establish effective records management practices. Prior to the termination of a Presidential committee, a representative of the committee shall coordinate with the White House Counsel on the preservation of its records in accordance with the Presidential Records Act, 44 USC Chap. 22." The table must be revised consistent with these changes. The table must also be corrected to reflect the appropriate section number for records management responsibilities.

3. We also believe that Subpart E would be strengthened if it specified all record keeping requirements, not just those for taking minutes. This section should bring together the requirements for the Secretariat to maintain the charter, all correspondence generated by or on behalf of the

committee, reports and publications, project files, public relations materials, agendas and minutes of subcommittee meetings, submissions by contractors, as well as the records of meetings, which could include sound or video recordings and transcripts. Also included should be the electronic copies of records and the system documentation for committee-specific programs or applications.

4. The requirements of section 102-3.165 and the definition of "Committee meeting," in section 102-3.30 are in conflict. The definition of a committee meeting includes, and therefore allows, "gatherings of committee members . . . through electronic means." Section 102-3.165 sets out the physical and procedural requirements for an advisory committee meeting. None of the requirements for accessibility, accommodation, or public participation of section 102-3.165 can be met if the meeting is an "electronic" gathering. Section 102-3.165 should be expanded to include guidance for holding committee meetings via electronic means.

5. NARA's general counsel, Gary M. Stern, would appreciate the opportunity to meet with your office prior to the regulations being promulgated to discuss the record keeping issues raised in these comments. He may be contacted at 301-713-6025.

If you have questions concerning our comments, please contact Mary Ann Hadyka, Policy and Planning Staff, at 301-713-7360 ext. 222; by fax at 301-713-7270; or by email at maryann.hadyka@arch2.nara.gov.

(b) (6)

Lori A. Lisowski
Director
Policy and Planning Staff

OPTIONAL FORM 99 (7-90)

FAX TRANSMITTAL # of pages ► 2

To: Chuck Howton	From: Mary Ann Hadyka
Dept/Agency	Phone # 301 713-7360
Fax # 202 273-3559	Fax # 301 713-7270

NSN 7540-01-317-7368 5099-101 GENERAL SERVICES ADMINISTRATION

Oral 3/24/00

#F17

From: "John Szabo" <JLS@nrc.gov> AT internet on 03/24/2000 10:17 AM

To: Charles F. Howton/MC/CO/GSA/GOV

cc:

Subject: NRC Comments on Proposed FACA Rule

Attached are the NRC comments on the proposed FACA rule. We also sent them by regular mail. Please call me if you have any questions at 301/415-1610.

Thanks for your help and granting an extension.

 - facaregs.gsa

March 24, 2000

Mr. James L. Dean
Director
Committee Management Secretariat (MC)
General Services Administration
Office of Governmentwide Policy
1800 F Street, N.W.
Room G-230
Washington, D.C. 20405

Dear Mr. Dean:

We appreciate the opportunity to comment on the proposed rule published in the Federal Register of January 14, 2000, which would revise the regulations implementing the Federal Advisory Committee Act (FACA). We commend this effort to update the regulations to reflect pertinent developments over the past decade but believe that further clarification is needed on several issues.

Subcommittees

The preamble states that a subcommittee which reports to a parent advisory committee is not subject to the FACA. 65 FR 2504. This could be read to mean that, no matter what the circumstances, subcommittee meetings are not subject to FACA. However, the guidance in the first key point in the table in section 102-3.200 provides that, while subcommittees need not open their meetings to the public, it also "cautions" agencies against closing subcommittee meetings to the public:

> "where a subcommittee develops substantive advice or recommendations which are subject to only nominal review by the parent committee before being submitted to a Federal agency or official. Such exclusions would run counter to FACA's provisions requiring contemporaneous access to the committee deliberative process."

Further clarification is needed as to whether and, if so, when subcommittee meetings are subject to FACA.

In addition, the definition of a subcommittee provides that its members could be drawn "in whole or in part from the parent committee." It has been our understanding that all members of an advisory subcommittee are also members of the full committee. Providing otherwise would create uncertainties about the application of personnel and conflict of interest laws to

subcommittee members who are not members of the full committee. We believe that the proposed rule should address the status of subcommittee members who are not members of the parent committee, how they can be appointed, and what restrictions apply to them.

Utilized

The activities of "utilized committees" are subject to FACA. The major change in the definition of a "utilized committee," according to the preamble, would be to emphasize the degree to which the Executive Branch exercises "actual management and control" over a group not directly established by an agency. The definition in the proposed rule provides that a committee not established by the Federal Government is utilized under FACA when the President or a Federal agency exercises actual management and control over its operation. 41 CFR 102-3.30.

Further discussion of this definition of the term "utilized" states, in the first key point and guidance in section 102-3.40, that advice and recommendations from external groups on a one-time or regular basis where the agency does not exercise "actual management and control" over the group would not be subject to FACA. Examples in the table under section 102-3.40 would exclude from FACA a local citizens group meeting with Federal officials regarding improvement of the condition of forest trails and quality of concessions, as well as Federal officials' attending meetings of external groups where advice and recommendations are offered during the discussions.

The preamble and these provisions suggest that, absent "actual management and control" over the meetings by a Federal agency, there would be no FACA implications if Federal employees regularly met with private groups, including those established by agency contractors and licensees, to deliberate on issues that fall under the responsibility of the Federal agency. However, paragraph B of the guidance in section 102-3.40 advises agencies that the group is not automatically excluded from FACA even if the agency did not appoint the group's members, determine its composition, set its agenda, or fund its activities. Furthermore, it states that agencies may need to reconsider the status of the group under FACA if the relationship in question is essentially indistinguishable from an advisory committee established by an agency.

We find this advice to be internally inconsistent and believe further clarification is needed on this important issue. We, therefore, recommend that the definition and the key points and principles on a "utilized" committee be amended to eliminate this confusion and develop clear criteria. The rule should explain what type and degree of "management and control" by a Federal agency would meet the standard of a "utilized" committee. In particular, we would appreciate a clarification regarding situations where there are meetings between Federal officials and representatives of outside parties. At what point would such a meeting be subject to the FACA? For example, would there be a FACA committee if Federal employees meet and deliberate with a private group on a Federal matter at the invitation of the group at the private group's premises? Would the answer change if the contractor is invited by the agency to meet on the agency's premises and a Federal employee ran the meeting?

Operational committees

"Operational committees" are not subject to FACA. The definition of an operational committee

is basically identical to the current regulation. 41 CFR 101-6.1104(g). However, the guidance in section 102-3.40 lists the following characteristics of an operational committee: specific functions

and/or authorities provided by Congress by law; an ability to make and implement decisions; a dedicated budget and staff; a legal, authoritative relationship with an agency; and a membership appointed by the President, Congress, and/or agency head. We believe that the result of requiring all these characteristics would be the elimination of almost all operational committees and would thus defeat the original intent of this term. We, therefore, recommend that the guidelines state that an "operational" committee may have some or all of these characteristics, but does not necessarily need all of them.

Seeking feedback

The proposed rule would require agencies to continually seek feedback from advisory committee members and the public regarding the effectiveness of the committee's activities. At regular intervals, agencies should communicate to the committee how its advice has affected their programs and decisionmaking. There is nothing in the proposed rule about how these requirements are to be implemented. We presume that this provision would not require additional efforts by advisory committees that already actively seek and receive such feedback. However, as to other advisory committees, this provision could also result in agencies' devoting substantial resources to implementation of FACA. We note that there is no statutory requirement mandating this provision and recommend reconsideration of the need for this provision.

Additional comments are set forth in an enclosure to this letter.

We again appreciate the opportunity to provide the views of the NRC on the proposed rule. Please contact John Szabo of the Office of the General Counsel if you have any questions at 301/415-1610 or e-mail at jls@nrc.gov.

Sincerely,

Karen D. Cyr
General Counsel

Enclosure: Additional Comments on Proposed Rule

ADDITIONAL COMMENTS ON PROPOSED RULE

Section 102-3.75(b): To satisfy the requirement that agencies must consult with the Secretariat before establishing, reestablishing, or renewing an advisory committee, this provision would provide agencies with the option to develop and submit an annual plan or submit a letter and the proposed charter to the Secretariat. We recommend that this provision explain more fully what is meant by an "annual plan" in this context.

Section 102-3.80: Although the proposed rule would require a public notice in the Federal Register when a discretionary advisory committee is established, reestablished, or renewed, there is no similar requirement for revisions to a committee charter. We recommend that the rule require that a notice be published when there is a major revision to a committee charter.

Section 102-3.140: This provision would require the designation of a Federal employee to serve as the Designated Federal Official (DFO) for each advisory committee and its subcommittees. Because there may be situations where the DFO may not be able to attend committee meetings or carry out other DFO duties, we recommend that this provision be amended to provide for the selection of other employees to serve as "alternate DFO."

Sections 102-3.150(d), (e), and (g): These provisions on determining compensation for advisory committee members, committee staff, and committee consultants would tie the rates of pay for members, staff, and consultants to the General Schedule. Because, as an excepted agency, the NRC is not under the General Schedule pay system, we recommend that these provisions be appropriately amended to add the phrase "or equivalent agency system" to include agencies that are not under the General Schedule.

Section 102-3.190(e): This provision would require that committee and subcommittee minutes be "finalized" within 90 calendar days of the meeting. We recommend that this term be changed to "certified," which would be consistent with the first paragraph of this section, which requires that the committee chairperson "certify" to the accuracy of the minutes.

Section 102-3.200: The first key point and guidance in the table in this provision relate to opening all advisory committee and subcommittee activities to the public. Paragraph B of the guidance "cautions" agencies to avoid excluding the public from a subcommittee meeting that develops substantive advice or recommendations which are subject to only nominal review by the parent committee. To prevent inadvertent violations and provide clear guidance, we recommend that the Paragraph B be relettered as Paragraph A and that it read as follows:

> "Subcommittee meetings must be open to the public when the meeting develops substantive advice or recommendations which are subject to only nominal review by the parent committee before submission to a Federal agency or official. Closing these types of meetings would run counter to FACA's provisions requiring contemporaneous access to the committee deliberative process."

We also recommend that paragraph A be relettered as paragraph B and that the following clause be added at the end:

if the subcommittee activity will receive a full review by the parent committee, is pre-deliberative, or focuses solely on administrative matters of the committee.

Charles F. Howton
03/06/2000 10:02 AM

Dep. VD - he will forward to us for website.

To: James L. Dean/MC/CO/GSA/GOV@GSA, Deborah F. Connors/MC/CO/GSA/GOV@GSA
cc:

#F2

Subject: Review of Proposed Rule on Federal Advisory Committee Mana

fyi -- comment #2

---------- Forwarded by Charles F. Howton/MC/CO/GSA/GOV on 03/06/2000 09:40 AM ----------

From: "Vincent J.Salamone" <VJSALAMO@OGE.GOV> AT internet on 03/03/2000 02:18 PM

To: Charles Howton@GSA@INTERNET
cc:

Subject: Review of Proposed Rule on Federal Advisory Committee Mana

---

Charles F. Howton
Deputy Director
Committee Management Secretariat

Dear Chuck:

Per our telephone discussion today, here are OGE's comments concerning the proposed rule on Federal advisory committee management. If you have any additional questions, please give me a call at 202-208-8000, extension 1134. As I noted, the comments below were discussed with OGE's General Counsel.

Specific Comments

1. Page 2508, 41 C.F.R. ° 102-3.20: I note that there is no designation of a subsection (a) although there is a subsection (b) contained in this section.

2. Page 2517, 41 C.F.R. ° 102-3.155 (Chart, Section III, fourth column entitled *Guidance*, item *B*, second and third sentences): The current language is unclear about which kind of advisory committee members are actually subject to the ethics rules. I would replace the second and third sentences with the following sentences:

*The determination of a member*s status on an advisory committee is largely a personnel classification matter for the appointing agency. Most advisory committee members will serve as either a representative or special Government employee (SGE). In general, SGEs are covered by regulations issued by the U.S. Office of Government Ethics (OGE) and certain conflict of interest statutes, while representatives are not subject to these ethics requirements.*

Also, you might want to move the above discussion of representatives and SGEs to section A since that section first introduces the concept of having advisory committee members representing the interests of organizations.

3. Page 2517, 41 C.F.R. ° 102-3.155 (Chart, Section V, fourth column entitled *Guidance*, fourth bullet): I would add, after the word *statutes* (move the period), the words *and administrative ethics rules.* Advisory committee members who are Government employees are also subject to these rules in addition to the conflict-of-interest statutes presently noted in the bullet.

Sincerely,

Vince Salamone
Attorney-Advisor
Office of Government Ethics

PETA
PEOPLE FOR THE ETHICAL TREATMENT OF ANIMALS
501 FRONT STREET
NORFOLK, VA 23510
TEL 757-622-PETA
FAX 757-622-0457

March 14, 2000

General Services Administration
Office of Government-wide Policy
Committee Management Secretariat (MC)
1800 F. Street, NW
Room G-230
Washington, DC 20405

VIA FACSIMILE TO: 202-273-3559

These comments on "Federal Advisory Committee Management; Proposed Rule" are submitted on behalf of People for the Ethical Treatment of Animals (PETA), the largest animal rights organization in the world with over 600,000 members, and Earth Island Institute (EEI), a national environmental organization with 100,000 members.

PETA and EEI strongly oppose the exemption of Federal Advisory Committee Act (FACA) subcommittees from FACA requirements. It has been our experience with the Environmental Protection Agency (EPA) over the past 16 months that many meetings take place, and many decisions having wide-ranging ramifications are made, behind closed doors. Only the favored non-governmental organizations that the agency is used to, and comfortable in dealing with, are invited and other non-governmental organizations are left without agency access.

The EPA requires more chemical toxicity testing on animals than any other federal agency. Yet, to date, there has been a complete lack of consideration of animal protection concerns by that agency and an almost complete failure to include animal protection representatives on advisory committees and taskforces. PETA learned of the largest government-sponsored animal-testing program, the EPA's high production volume (HPV) chemical testing program, just by chance because no notice of this program has ever been published in the *Federal Register*. The EPA was eventually forced to acknowledge the scientific merit of our challenges to the HPV program once we, belatedly, were able to present our concerns. Unfortunately, we continue to learn of ongoing meetings regarding other massive animal-testing programs by reading about them in the trade press, rather than through the appropriate channel which is the *Federal Register*.

Of obvious concern to us is that much of an advisory committee's work can be done in "subcommittees," with scientists and others avoiding attendance at the advisory committee meetings so as to avoid public scrutiny. Subcommittee meetings should be subject to full public disclosure and there is no credible reason to exempt them from FACA requirements. It is essential for the fulfillment of our mission to protect animals that there be full public disclosure, balanced representation, and proper public notice and comment. We therefore object strenuously to the new "clarification" that clearly violates the plain language, as well as the spirit, of FACA and renders its implementation meaningless.

Sincerely,

(b) (6)

Jessica T. Sandler, MHS
Federal Agency Liaison
tel: 757-622-7382, ext. 304

Draft 4/25/00 (per discuss. MW)

From: <richard.baker@DTRA.MIL> AT internet on 04/25/2000 01:34 PM

To: James L. Dean/MC/CO/GSA/GOV, Charles F. Howton/MC/CO/GSA/GOV
cc: Margaret A. Weber/MC/CO/GSA/GOV

Subject: FW: Final Rule

4/26/00 - discuss. MW, will do courtesy copy to Col Baker at some point.

Dear Mr Dean and Howton,

Maggie recommended I pass along my ideas/concerns on your final rule for FACA. I have read all the comments to the proposed rule. I am concerned that changes based on some of the comments could significantly change the proposed rule. I personally thought the proposed rule had it quite right.

On the rule itself:
I am concerned in the area of support to a FACA. The proposed rule makes support to FACs by government staff and consultant to the government an option (102-3.150e and 102-3.155 Table, II B.) But, in this world of increasing outsourcing, could we provide for the option of contractor administrative support for a FAC also?

General Public Comment 2: Advocates:
I could support a consistent use of "and" vs "or" on the "management and control" thing as a test for FACA-ness. However, the use of funding as a test of management or control would not seem relevant in all cases. Therefore, direct measures such a setting agendas, picking members, and directing meetings are better measures of managing or controlling.

General Public Comment 3: PETA: I don't think this is a problem across the board.

Federal Comment 1: Warrants careful analysis. On FACA groups, I would think that participation by the government would be at the option of the sponsor, who can control such and know what kind of advice he/she is looking for. On non-FACA subgroups, I would think the Chairman of the subgroup would make this determination.

Fed Comment # 11. In the DOD FACs I've been involved with, we've not said that only members of the FAC must serve on non-FACA subgroups. In fact, if it is a non-FACA subgroup that does the grunt work, then one shouldn't really care who sits on the group, as long as ethics and financial disclosures are taken care of for people who routinely are invited to the meetings of the non-FACA subgroup. On the other hand, if the subgroup is a FACA in its own right, then its membership would be its own membership, which I would think would come from the master FAC, but not necessarily all.

I urge caution on the NRC and EPA comments. Staying with the general vs. the specific may be better.

So the question is, will we see another version of the rule before you go final with all these changes?

Rick Baker

Colonel Rick Baker, USAF
Executive Director
Threat Reduction Advisory Committee
DTRA/AS
703-810-4759

-----Original Message-----
From: maggie.weber@gsa.gov [mailto:maggie.weber@gsa.gov]
Sent: Tuesday, April 25, 2000 11:59 AM
To: richard.baker@DTRA.MIL
Subject: Final Rule

Col Baker,

All postings of the Rule are finished. It will now remain internal until the Final Rule is published.

Jim and Chuck suggested that you send an e-mail to them (james.dean@gsa.gov, charles.howton@gsa.gov) if you have any comments. They are working on the Final Rule now and welcome your input.

Maggie

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3/22/00

March 16, 2000

Mr. Charles F. Howton
Deputy Director, Committee Management Secretariat (MC)
General Services Administration
Office of Government Policy
1800 F Street, NW (Room G-320)
Washington, DC 20405

Dear Mr. Howton:

GSA's proposed rule (65 FR 2504, 1/14/2000) to revise government administration of federal advisory committees operated under the Federal Advisory Committee Act has only recently come to our attention. We would like to request that the comment deadline of March 14, 2000 be extended by 60 days until May 15, 2000.

The Federal Register notice soliciting comments on this proposed rule makes clear that it "solely applies to Departments and agencies within the Executive Branch" of the federal government. The discussion therein tends to indicate that development of the proposed rule and the comments process have been focused almost solely on the federal agencies that administer federal advisory committees. It simply has not caught the attention of the individuals and non-governmental organizations that participate on such committees.

We would like to point out that stakeholders in the private sector -- private citizens, public interest groups, industries, trade associations -- all have a tremendous stake in how the government operates federal advisory committees. Such committees have become a vital and extremely important means of interaction with the public that the government serves and regulates. Public input must be considered in deciding when such committees are and are not used to obtain public input into federal agency activities and operations. Stakeholder participation in developing the rules by which such committees operate must be actively encouraged and sought out. The federal government must not be perceived as trying to exclude the public from helping to decide how it is to be governed.

Please acknowledge receipt of this comments deadline request. Also please send me details of the public dockets created to receive comments for this proposed rule, as well as the Advanced Notice or Proposed Rulemaking published in 1997 (62 FR 31550; 6/10/97), including where and how public access to the dockets is available.

(b) (6)

Mari Stull
Director, International Regulatory Policy
Grocery Manufacturer's of America
Email: mls@gmabrands.com

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PHONE (202) 337-9400
FAX (202) 337-4508
www.gmabrands.com

March 14, 2000

Copy 3/20/00

Mr. Charles F. Howton
Deputy Director, Committee Management Secretariat (MC)
General Services Administration
Office of Government Policy
1800 F Street, NW (Room G-320)
Washington, DC 20405

Dear Mr. Howton:

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Sincerely,

Ray S. McAllister
Senior Director, Science & Regulatory Policy
American Crop Protection Association
1156 - 15th St., NW, Suite 400
Telephone: 202-872-3874
Fax: 202-463-8256
E-mail: ray@acpa.org

Charles F. Howton
03/14/2000 04:21 PM

To: <acj@gmabrands.com> AT internet@ccMTA-GEMS-MTA-01
cc: ray@acpa.org

Subject: Re: letter from Ray Mc. Allister

This acknowledges the receipt of your inquiry. Please see the attached information.

Cmtextresp.d

From: <acj@gmabrands.com> AT internet on 03/14/2000 03:12 PM

From: <acj@gmabrands.com> AT internet on 03/14/2000 03:12 PM
To: Charles F. Howton/MC/CO/GSA/GOV
cc:

Subject: letter from Ray Mc. Allister

Mr. Howton:

I will be mailing you a copy as well of this letter as well.

Sincerely,

Alisen C. James

- March14.doc

3/14/00

From: <acj@gmabrands.com> AT internet on 03/14/2000 03:12 PM

To: Charles F. Howton/MC/CO/GSA/GOV

cc:

Subject: letter from Ray Mc. Allister

Mr. Howton:

I will be mailing you a copy as well of this letter as well.

Sincerely,

Alisen C. James

 - March14.doc

March 14, 2000

Mr. Charles F. Howton
Deputy Director, Committee Management Secretariat (MC)
General Services Administration
Office of Government Policy
1800 F Street, NW (Room G-320)
Washington, DC 20405

Dear Mr. Howton:

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The Federal Register notice soliciting comments on this proposed rule makes clear that it "solely applies to Departments and agencies within the Executive Branch" of the federal government. The discussion therein tends to indicate that development of the proposed rule and the comments process have been focused almost solely on the federal agencies that administer federal advisory committees. It simply has not caught the attention of the individuals and non-governmental organizations that participate on such committees.

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Please acknowledge receipt of this comments deadline request. Also please send me details of the public dockets created to receive comments for this proposed rule, as well as the Advanced Notice or Proposed Rulemaking published in 1997 (62 FR 31550; 6/10/97), including where and how public access to the dockets is available.

Sincerely,

Ray S. McAllister
Senior Director, Science & Regulatory Policy
American Crop Protection Association
1156 - 15th St., NW, Suite 400
Telephone: 202-872-3874
Fax: 202-463-8256
E-mail: ray@acpa.org

Charles F. Howton
03/20/2000 04:39 PM

To: david_fischer@cmahq.com
cc:

Subject: GSA Proposed Rule

Thank you for your inquiry today. Please see the attached information.


Cmtextresp.d

Charles F. Howton
03/20/2000 04:35 PM

To: kim_foster@fmc.com
cc:

Subject: GSA Proposed Rule

This acknowledges the receipt of your correspondence of 3/13/00. Please see the attached information.


Cmtextresp.d

FMC Corporation

Agricultural Products Group
1735 Market Street
Philadelphia Pennsylvania 19103
215 299 6000

3/20/00

March 13, 2000

Mr. Charles F. Howton (Charles.howton@gsa.gov, 202-273-3561)
Deputy Director, Committee Management Secretariat (MC)
General Services Administration
Office of Government Policy
1800 F Street, NW (Room G-320)
Washington, DC 20405

Dear Mr. Howton:

GSA's proposed rule (65 FR 2504, 1/14/2000), which would revise government administration of federal advisory committees operated under the Federal Advisory Committee Act, has just come to my attention. I request that the comment deadline of March 14, 2000 be extended by 60 days until May 15, 2000.

The Federal Register notice soliciting comments on this proposed rule makes clear that it "solely applies to Departments and agencies within the Executive Branch" of the federal government. The discussion therein tends to indicate that development of the proposed rule and the comments process have been focused almost solely on the federal agencies that administer federal advisory committees. It simply has not caught the attention of the individuals and non-governmental organizations that participate on such committees.

I would also point out that stakeholders in the private sector -- private citizens, public interest groups, industries, trade associations -- all have a tremendous stake in how the government operates federal advisory committees. Such committees have become a vital and extremely important means of interaction with the public that the government serves and regulates. Public input must be considered in deciding when such committees are and are not used to obtain public input into federal agency activities and operations. Stakeholder participation in developing the rules by which such committees operate must be actively encouraged and sought out. The federal government must not be perceived as trying to exclude the public from helping to decide how it is to be governed.

Please acknowledge receipt of this comments deadline request.

Thank you.

Sincerely
(b) (6)

Kim Foster
Vice President & General Manager
FMC Corporation
1735 Market Street, Philadelphia, PA 19103
tel: 215 299-6438 fax: 215 299-6574
e-mail: Kim_Foster@fmc.com

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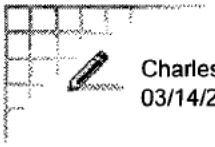

Charles F. Howton
03/14/2000 03:11 PM

To: "Brigid Klein" <bklein@csma.org> AT internet@ccMTA-GEMS-MTA-01
cc:

Subject: Re: Extension Request

This acknowledges the receipt of your inquiry. Please see the attached information.

Cmtextresp.d

From: "Brigid Klein" <bklein@csma.org> AT internet on 03/14/2000 01:54 PM

From: "Brigid Klein" <bklein@csma.org> AT internet on 03/14/2000 01:54 PM

To: Charles F. Howton/MC/CO/GSA/GOV
cc:

Subject: Extension Request

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receipt of this request.


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3/14/00

From: "Brigid Klein" <bklein@csma.org> AT internet on 03/14/2000 01:54 PM

To: Charles E. Howton/MC/CO/GSA/GOV
cc:

Subject: Extension Request

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------=_NextPart_001_00AD_01BF8DBC.D44198A0
Content-Type: text/plain;
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Attached please find a request for extension of the comment period for = the
proposed rule on federal advisory committee management.  Please = confirm
receipt of this request.


------=_NextPart_001_00AD_01BF8DBC.D44198A0
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 charset=iso-8859-1
Content-Transfer-Encoding: quoted-printable

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<META content=3D'"MSHTML 4.71.1712.3"' name=3DGENERATOR>
</HEAD>
<BODY bgColor=3D#ffffff>
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<P>Attached please find a request for extension of the comment period =
for the=20
proposed rule on federal advisory committee management.  Please =
confirm=20
receipt of this request.</P></FONT></DIV></BODY></HTML>

------=_NextPart_001_00AD_01BF8DBC.D44198A0--
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 - extension.doc

Via Electronic Mail

March 14, 2000

Mr. Charles F. Howton
Deputy Director
Committee Management Secretariat (MC)
General Services Administration
Office of Government Policy
1800 F Street, NW (Room G-320)
Washington, DC 20405

Dear Mr. Howton:

The Chemical Specialties Manufacturers Association (CSMA) has just become aware of the GSA proposed rule to revise government administration of federal advisory committees operated under the Federal Advisory Committee Act, 65 FR 2504, January 14, 2000. We are, therefore, requesting a 60 day extension to the comment period currently scheduled to end on March 14, 2000.

The Federal Register notice soliciting comments on this proposed rule makes clear that it "solely applies to Departments and agencies within the Executive Branch" of the federal government. The discussion therein tends to indicate that development of the proposed rule and the comments process have been focused almost solely on the federal agencies that administer federal advisory committees. It has simply not caught the attention of the individuals and non-governmental organizations that participate on such committees.

We would like to point out that stakeholders in the private sector --private citizens, public interest groups, industries, trade associations -- all have a tremendous stake in how the government operates federal advisory committees. Such committees have become a vital and extremely important means of interaction with the public that the government serves and regulates. Public input must be considered in deciding when such committees are and are not used to obtain public input into federal agency activities and operations. Stakeholder participation in developing the rules by which such committees operate must be actively encouraged and sought out. The federal government must not be perceived as trying to exclude the public from helping to decide how it is to be governed.

We appreciate your consideration of our request.

Sincerely,

Brigid D. Klein
Regulatory Counsel
Chemical Specialties Manufacturers Association
1913 Eye Street, NW
Washington, DC 20006
202-872-8110
bklein@csma.org

Charles F. Howton
03/13/2000 06:04 PM

To: jmaguire@cotton.org
cc: jcurry@cotton.org

Subject: Federal Advisory Committee Management; Proposed Rule

This acknowledges the receipt of your inquiry. Please see the attached information.

Cmtextresp.d

---------- Forwarded by Charles F. Howton/MC/CO/GSA/GOV on 03/13/2000 05:59 PM ----------

From: "Joyce Curry" <jcurry@cotton.org> AT internet on 03/13/2000 03:14 PM

To: Charles F. Howton/MC/CO/GSA/GOV
cc:

Subject: Federal Advisory Committee Management; Proposed Rule

---

March 10, 2000

Mr. Charles F. Howton
Deputy Director, Committee Management Secretariat (MC)
General Services Administration, Office of Government Policy
1800 F Street, NW (Room G-320)
Washington, DC 20405

Dear Mr. Howton:

The National Cotton Council of America hereby requests that the General Services Administration extend by 60 days the comment deadline for the proposed rule to revise government administration of federal advisory committees (65 FR 2504, 1/14/2000) operated under the Federal Advisory Committee Act. This proposal has only recently come to our attention and we could benefit from an additional amount of time to review the rule.

The National Cotton Council is the central organization of the United States cotton industry. Its members include producers, ginners, oilseed crushers, merchants, cooperatives, warehousemen, and textile manufacturers. While a majority of the industry is concentrated in 17 cotton producing states, stretching from the Carolinas to California, the downstream manufacturers of cotton apparel and homefurnishings are located in virtually every state.

The National Cotton Council and its members participate in a variety of federal advisory committees, and we have found the process to be generally beneficial to the industry and the government. These committees are an important means of interaction between private citizens and the federal

Ltr 3/13/00

Sent TD - sent for Maguire, below
Same ltr att to next email
TD email resp only? OK

From: "Joyce Curry" <jcurry@cotton.org> AT internet on 03/13/2000 03:14 PM

To: Charles F. Howton/MC/CO/GSA/GOV
cc:

Subject: Federal Advisory Committee Management; Proposed Rule

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We request that the comment deadline on the proposed rule be extended from March 14, 2000, until May 15, 2000. Thank you for your consideration of this request.

Sincerely,

John Maguire
Vice President, Washington Operations
National Cotton Council of America
1521 New Hampshire Avenue, NW
Washington, DC 20036
202-745-7805
202-483-4040 - fax
jmaguire@cotton.org

3/13/00

From: "Joyce Curry" <jcurry@cotton.org> AT internet on 03/13/2000 03:21 PM

To: Charles F Howton/MC/CO/GSA/GOV
cc:

Subject: GSA Proposed Rule

Comments from the National Cotton Council of America.

 - GSADeadl.doc

Ltr 3/13/00

From: "Joyce Curry" <jcurry@cotton.org> AT internet on 03/13/2000 03:14 PM

To: Charles F. Howton/MC/CO/GSA/GOV
cc:

Subject: Federal Advisory Committee Management; Proposed Rule

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March 10, 2000

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OF AMERICA
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John Maguire
Vice President – Washington Operations

Charles F. Howton
03/13/2000 05:59 PM

To: "Judy Thompson" <jathom@mailbag.com> AT internet@ccMTA-GEMS-MTA-01
cc: "Ray McAllister" <ray@acpa.org> AT internet@ccMTA-GEMS-MTA-01

Subject: Re: Comments-Federal Advisory Committees

This acknowledges the receipt of your inquiry. Please see the attached information.

Cmtextresp.d

From: "Judy Thompson" <jathom@mailbag.com> AT internet on 03/13/2000 11:25 AM

From: "Judy Thompson" <jathom@mailbag.com> AT internet on 03/13/2000 11:25 AM
To: Charles F. Howton/MC/CO/GSA/GOV
cc: "Ray McAllister" <ray@acpa.org> AT internet@ccMTA-GEMS-MTA-01

Subject: Comments-Federal Advisory Committees

March 13, 2000

Mr. Charles F. Howton (Charles.howton@gsa.gov, 202-273-3561)
Deputy Director, Committee Management Secretariat (MC)
General Services Administration
Office of Government Policy
1800 F Street, NW (Room G-320)
Washington, DC 20405

Dear Mr. Howton:

GSA's proposed rule (65 FR 2504, 1/14/2000) to revise government administration of
federal advisory committees operated under the Federal Advisory Committee
Act has
only recently come to our attention. It has been brought to our attention by Ray McAllister of ACPA. We would like to request that the
comment
deadline of March 14, 2000 be extended by 60 days until May 15, 2000. We, as EPA registrants, have been closely associated with a stateholder's process involving an EPA Reregistration Document and found the process very beneficial to the Agency and to all others involved including trade associations, users, public interest groups, etc. The process by which Federal Advisory Committees are and are not used can be very important to us and to these groups.

The Federal Register notice soliciting comments on this proposed rule

3/13/00

From: "Judy Thompson" <jathom@mailbag.com> AT internet on 03/13/2000 11:25 AM

To: Charles F. Howton/MC/CO/GSA/GOV
cc: "Ray McAllister" <ray@acpa.org> AT internet@ccMTA-GEMS-MTA-01

Subject: Comments-Federal Advisory Committees

March 13, 2000

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Office of Government Policy
1800 F Street, NW (Room G-320)
Washington, DC 20405

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The Federal Register notice soliciting comments on this proposed rule makes clear that it "solely applies to Departments and agencies within the Executive Branch" of the federal government. The discussion therein tends to indicate that development of the proposed rule and the comments process have been focused almost solely on the federal agencies that administer federal advisory committees. It simply has not caught the attention of the individuals and non-governmental organizations that participate on such committees.

We would like to point out that stakeholders in the private sector -- private citizens, public interest groups, industries, trade associations -- all have a tremendous stake in how the government operates federal advisory committees. Such committees have become a vital and extremely important means of interaction with the public that the government serves and regulates. Public input must be considered in deciding when such committees are and are not used to obtain public input into federal agency activities and operations. Stakeholder participation in developing the rules by which such committees operate must be actively encouraged and sought out. The federal government must not be perceived as trying to exclude the public from helping to decide how it is to be governed.

Please acknowledge receipt of this comments deadline request. Also please send me details of the public dockets created to receive comments for this proposed rule, as well as the Advanced Notice or Proposed Rulemaking published in 1997 (62 FR 31550; 6/10/97), including where and how public access to the dockets is available.

Sincerely

Judith A. Thompson
Registration Manager, Rodenticides
HACCO, Inc./UAP
P.O. Box 7190, Madison, WI 53707
tel: 608-221-7378 fax: 608-221-7380
e-mail: jathom@mailbag.com

Charles F. Howton
03/13/2000 05:57 PM

To: <buddy.formby@microflocompany.com> AT internet@ccMTA-GEMS-MTA-01
cc: ray@acpa.org AT internet@ccMTA-GEMS-MTA-01

Subject: Re: Request for Comments Deadline Extension

This acknowledges the receipt of your inquiry. Please see the attached information.

Cmtextresp.d

From: <buddy.formby@microflocompany.com> AT internet on 03/13/2000 11:05 AM

From: <buddy.formby@microflocompany.com> AT internet on 03/13/2000 11:05 AM
To: Charles F. Howton/MC/CO/GSA/GOV
cc: ray@acpa.org AT internet@ccMTA-GEMS-MTA-01

Subject: Request for Comments Deadline Extension

March 13, 2000

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General Services Administration
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Sincerely,

C.E. Formby
President

Chkt 3/13/00

From: <buddy.formby@microflocompany.com> AT internet on 03/13/2000 11:05 AM

To: Charles F. Howton/MC/CO/GSA/GOV
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Subject: Request for Comments Deadline Extension

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Sincerely,

C.E. Formby
President
Micro Flo Company
PO Box 772099
Memphis, TN 38117
tel: 901-432-5000 fax: 901-432-5100
e-mail: Buddy.Formby@MicroFloCompany.com

Charles F. Howton
03/13/2000 05:55 PM

To: <KWGGCSA@aol.com> AT internet@ccMTA-GEMS-MTA-01
cc:

Subject: Re: Request for Comments Extension

This acknowledges the receipt of your inquiry. Please see the attached information.

Cmtextresp.d
From: <KWGGCSA@aol.com> AT internet on 03/13/2000 09:35 AM

From: <KWGGCSA@aol.com> AT internet on 03/13/2000 09:35 AM
To: Charles F. Howton/MC/CO/GSA/GOV
cc:

Subject: Re: Request for Comments Extension

March 10, 2000

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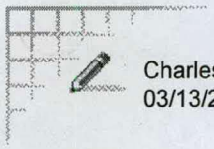

Charles F. Howton
03/13/2000 09:42 AM

To: James L. Dean/MC/CO/GSA/GOV@GSA
cc: Deborah F. Connors/MC/CO/GSA/GOV@GSA

Subject: Re: Request for Comments Extension

fyi

---------- Forwarded by Charles F. Howton/MC/CO/GSA/GOV on 03/13/2000 09:38 AM ----------

From: <KWGGCSA@aol.com> AT internet on 03/13/2000 09:35 AM

To: Charles F. Howton/MC/CO/GSA/GOV
cc:

Subject: Re: Request for Comments Extension

March 10, 2000

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Sincerely

Karen White
Executive Director
Georgia Golf Course Superintendents Association
tel: 706-742-2651 fax: 706-742-2655
e-mail: kwggcsa@aol.com

3/13/00

From: <KWGGCSA@aol.com> AT internet on 03/13/2000 09:35 AM

To: Charles F. Howton/MC/CO/GSA/GOV
cc:

Subject: Re: Request for Comments Extension

March 10, 2000

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tel: 706-742-2651 fax: 706-742-2655
e-mail: kwggcsa@aol.com

Charles F. Howton
03/13/2000 05:53 PM

To: <Chris_Shadday@RohmHaas.Com> AT internet@ccMTA-GEMS-MTA-01
cc:

Subject: Re: GSA's Proposed Rule (65 FR 2504, 1/14/2000)

This acknowledges the receipt of your inquiry. Please see the attached information.

Cmtextresp.d

From: <Chris_Shadday@RohmHaas.Com> AT internet on 03/11/2000 03:42 PM

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To: Charles F. Howton/MC/CO/GSA/GOV
cc:

Subject: GSA's Proposed Rule (65 FR 2504, 1/14/2000)

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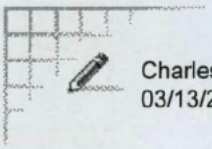

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cc: Deborah F. Connors/MC/CO/GSA/GOV@GSA

Subject: GSA's Proposed Rule (65 FR 2504, 1/14/2000)

fyi

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Please acknowledge receipt of this request for extenstion so that we can be confident you are willing to hear our concerns.

Sincerely,

Chris Shadday
Global e-Business Manager
Agricultural Chemicals Business
Rohm and Haas Company
E-Mail : Chris_Shadday@rohmhaas.com

3/13/00

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Chris Shadday
Global e-Business Manager
Agricultural Chemicals Business
Rohm and Haas Company
E-Mail : Chris_Shadday@rohmhaas.com

Charles F. Howton
03/13/2000 05:51 PM

To: "tom delaney" <tomd@plcaa.org> AT internet@ccMTA-GEMS-MTA-01
cc:

Subject: Re: (no subject)

This acknowledges the receipt of your inquiry. Please see the attached information.

Cmtextresp.d

From: "tom delaney" <tomd@plcaa.org> AT internet on 03/10/2000 09:12 PM

From: "tom delaney" <tomd@plcaa.org> AT internet on 03/10/2000 09:12 PM

To: Charles F. Howton/MC/CO/GSA/GOV
cc:

Subject: (no subject)

March 10, 2000

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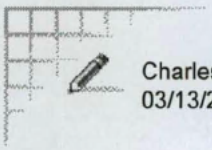
deadline of March 14, 2000 be extended by 60 days until May 15, 2000.

I have been on two FAC's recently the Storm Water Phase II and the Lawn Care Advisory Council several years ago. And have interest in commenting after I have a chance to review it with our association officers.

Sincerely,
Thomas J. Delaney
Executive Vice President
Professional Lawn Care Association of America



Charles F. Howton
03/13/2000 09:37 AM

To: James L. Dean/MC/CO/GSA/GOV@GSA
cc: Deborah F. Connors/MC/CO/GSA/GOV@GSA

Subject: (no subject)

fyi

---------- Forwarded by Charles F. Howton/MC/CO/GSA/GOV on 03/13/2000 09:34 AM ----------

From: "tom delaney" <tomd@plcaa.org> AT internet on 03/10/2000 09:12 PM

To: Charles F. Howton/MC/CO/GSA/GOV
cc:

Subject: (no subject)

March 10, 2000

Mr. Charles F. Howton
Deputy Director, Committee Management Secretariat (MC)
General Services Administration
Office of Government Policy
1800 F Street, NW (Room G-320)
Washington, DC 20405

Dear Mr. Howton:

GSA's proposed rule (65 FR 2504, 1/14/2000) to revise government administration of
federal advisory committees operated under the Federal Advisory Committee Act has
only recently come to my attention today. I would like to request that the comment
deadline of March 14, 2000 be extended by 60 days until May 15, 2000.

I have been on two FAC's recently the Storm Water Phase II and the Lawn Care Advisory Council several years ago. And have interest in commenting after I have a chance to review it with our association officers.

Sincerely,
Thomas J. Delaney
Executive Vice President
Professional Lawn Care Association of America

3/13/00

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Subject: (no subject)

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Sincerely,
Thomas J. Delaney
Executive Vice President
Professional Lawn Care Association of America

Charles F. Howton
03/13/2000 03:14 PM

To: "Sharon Kindle" <skindle@ttc-cmc.net> AT internet@ccMTA-GEMS-MTA-01
cc:

Subject: Re: extension of deadline for comments

This acknowledges the receipt of your inquiry. Please see the attached information.

Cmtextresp.d

From: "Sharon Kindle" <skindle@ttc-cmc.net> AT internet on 03/10/2000 05:04 PM

From: "Sharon Kindle" <skindle@ttc-cmc.net> AT internet on 03/10/2000 05:04 PM

To: Charles F. Howton/MC/CO/GSA/GOV, ray@acpa.org AT internet@ccMTA-GEMS-MTA-01
cc:

Subject: extension of deadline for comments

Mr. Charles f. Howton
Deputy Director
General Services Administration
Office of Government Policy
1800 F Street, NE Rm G-320
Washington, DC 20405

Dear Mr. Howton:

The March 14,2000 deadline is unacceptable to those of us in the private sector and we request the deadline to be extended to May 15, 2000 for more comments to be allowed.

This GSA proposed rule, [65 FR 2504, 1/14/2000]to revise government administration of federal advisory committees operated under the Federal Advisory Committee Act has just surfaced with the deadline being in two working days.

The Federal Register notice soliciting comments on the rule appears to take in Departments and agencies within the Executive Branch of our government. This reads to me, as a producer, the proposed rule is directed alomost soley on the federal agencies that administer federal advisory committees. The general public is unaware of this rule coming down so soon.

As a private citizen and user of pesticdes in my farming practice, my husband and I have a huge stake in this process which should be fully publicized before the deadline is two working days away. Our input is vital as we are

3/10/00

From: "Sharon Kindle" (b) (6) > AT internet on 03/10/2000 05:04 PM

To: Charles F. Howton/MC/CO/GSA/GOV, ray@acpa.org AT internet@ccMTA-GEMS-MTA-01

cc:

Subject: extension of deadline for comments

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General Services Administration
Office of Government Policy
1800 F Street, NE Rm G-320
Washington, DC 20405

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As a private citizen and user of pesticdes in my farming practice, my husband and I have a huge stake in this process which should be fully publicized before the deadline is two working days away. Our input is vital as we are the backbone of America as food producers. Without adequate protection for our crops we are unable to produce the needed food.

Once you exclude the private sector, you alienate many people by assuming the government knows best or one size fits all thinking.

I would appreciate acknowledgement of this letter requesting an extension of the deadline. Please send me the details of the public dockets created to receive comments for this proposed rule and the Advanced Notice or Proposed Rulemaking published in 1997 [62 FR 31550; 6/10/97] including where and how public access to the dockets is available.

Sincerely,

Sharon Kindle
(b) (6)
Malta MT (b) (6)
(b) (6)

Charles F. Howton
03/14/2000 03:27 PM

To: James L. Dean/MC/CO/GSA/GOV@GSA
cc:

Subject: GSA Proposed Rule

fyi -- see letter in your in-box.

---------- Forwarded by Charles F. Howton/MC/CO/GSA/GOV on 03/14/2000 03:24 PM ----------

Charles F. Howton
03/14/2000 03:27 PM

To: gregt@cs.net
cc:

Subject: GSA Proposed Rule

Thank you for your additional correspondence of 3/13/00, received by messenger today. The below information remains current as of today.

---------- Forwarded by Charles F. Howton/MC/CO/GSA/GOV on 03/14/2000 03:21 PM ----------

Charles F. Howton
03/13/2000 03:10 PM

To: gregt@cs.net
cc:

Subject: GSA Proposed Rule

Greg Theis
BASF

Attached per our conversation today is the information regarding the comment period on GSA's proposed rule on Federal Advisory Committee Management. Thank you for your inquiry.

Cmtextresp.d

Charles F. Howton
03/14/2000 03:27 PM

To: gregt@cs.net
cc:

Subject: GSA Proposed Rule

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Cmtextresp.d

BASF Corporation

BASF

CF: JD

3/14/00

March 13, 2000

Mr. Charles F. Howton
Deputy Director, Committee Management Secretariat
General Services Administration
Office of Government Policy
1800 F Street, NW (Room G-320)
Washington, DC 20405

VIA MESSENGER

Dear Mr. Howton:

As a follow-up to our conversation today, I wanted to thank you for the information you gave me, especially that which concerns GSA's offer to accept comments on the proposed rule concerning the Federal Advisory Committee Act.

Having had an opportunity to discuss this issue with colleagues I feel it necessary to call your attention to what appears to be a miscommunication about this proposed rule and the unintended effect it will have. Consequently, I am writing to request that you extend by 60 days the comment period on GSA's proposed rule (65 FR 2504) to revise the regulations which govern the operation of advisory committees under the Federal Advisory Committee Act.

The Federal Register notice soliciting comments on this proposed rule is clear that it "solely applies to Departments and agencies within the Executive Branch" of government. The discussion therein tends to indicate that development of the proposed rule and the comment process have been focused almost solely on the federal agencies that administer federal advisory committees. Because of the way in which the notice appeared in the Federal Register, it was overlooked by most affected parties until recently when an article appeared in the trade press.

We all have tremendous stake in how the government operates federal advisory committees. Such committees have become a vital and extremely important means of interaction with the public. In general, I believe these committees have had very positive effects on the operation of government because they promote open discussions and equitable resolutions. Likewise, public input must be considered in any proposal to change the regulations which govern the operation of these important committees. The proposed rule, like many of the issues successfully managed by committees established under FACA, will benefit greatly from broad public response. Given the circumstances, however, I believe the response you receive will be limited unless you extend the comment period.

Your prompt consideration of this request is greatly appreciated.

Sincerely,

(b) (6)

Gregory A. Thies
Director, Government Relations

cc: Martin Mascianica
Ray McAllister

601 13th Street, NW, Suite 200 North, Washington, DC 20005 Phone: (202) 682-9462; Telefax: (202) 682-9459

Charles F. Howton
03/13/2000 03:10 PM

To: gregt@cs.net
cc:

Subject: GSA Proposed Rule

Greg Theis
BASF

Attached per our conversation today is the information regarding the comment period on GSA's proposed rule on Federal Advisory Committee Management. Thank you for your inquiry.

Cmtextresp.d

Charles F. Howton
03/13/2000 03:02 PM

To: James L. Dean/MC/CO/GSA/GOV@GSA
cc: Deborah F. Connors/MC/CO/GSA/GOV@GSA

Subject: Re: Request for Comments Deadline Extension

fyi -- for this 1st one. I won't fwd the other responses.

---------- Forwarded by Charles F. Howton/MC/CO/GSA/GOV on 03/13/2000 02:58 PM ----------

Charles F. Howton
03/13/2000 03:00 PM

To: "Ray McAllister" <RAY@acpa.org> AT internet@ccMTA-GEMS-MTA-01
cc:

Subject: Re: Request for Comments Deadline Extension

This acknowledges the receipt of both your voice-mail and E-mail inquiries. Please see the attached information regarding your request. Thank you.

Cmtextresp.d

From: "Ray McAllister" <RAY@acpa.org> AT internet on 03/10/2000 02:33 PM

From: "Ray McAllister" <RAY@acpa.org> AT internet on 03/10/2000 02:33 PM
To: Charles F. Howton/MC/CO/GSA/GOV
cc:

Subject: Request for Comments Deadline Extension

March 10, 2000

Mr. Charles F. Howton (Charles.howton@gsa.gov, 202-273-3561)
Deputy Director, Committee Management Secretariat (MC)
General Services Administration
Office of Government Policy
1800 F Street, NW (Room G-320)
Washington, DC 20405

Dear Mr. Howton:

GSA's proposed rule (65 FR 2504, 1/14/2000) to revise government

Charles F. Howton
03/13/2000 03:00 PM

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cc:

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To: Charles F. Howton/MC/CO/GSA/GOV
cc:

Subject: Request for Comments Deadline Extension

March 10, 2000

Mr. Charles F. Howton (Charles.howton@gsa.gov, 202-273-3561)
Deputy Director, Committee Management Secretariat (MC)
General Services Administration
Office of Government Policy
1800 F Street, NW (Room G-320)
Washington, DC 20405

Dear Mr. Howton:

GSA's proposed rule (65 FR 2504, 1/14/2000) to revise government administration of federal advisory committees operated under the Federal Advisory Committee Act has only recently come to our attention. We would like to request that the comment deadline of March 14, 2000 be extended by 60 days until May 15, 2000.

The Federal Register notice soliciting comments on this proposed rule makes clear that it "solely applies to Departments and agencies within the Executive Branch" of the federal government. The discussion therein tends to indicate that development of the proposed rule and the comments process have been focused almost solely on the federal agencies that administer federal advisory committees. It simply has not caught the attention of the individuals and non-governmental organizations that participate on such committees.

We would like to point out that stakeholders in the private sector -- private citizens, public interest groups, industries, trade associations -- all have a tremendous stake in how the government operates federal advisory committees. Such committees have become a vital and extremely important means of interaction with the public that the government serves and regulates. Public input must be considered in deciding when such committees are and are not used to obtain public input into federal agency activities and operations. Stakeholder participation in developing the rules by which such committees operate must be actively encouraged and sought out. The federal government must not be perceived as trying to exclude the public from helping to decide how it is to be governed.

Please acknowledge receipt of this comments deadline request. Also please send me details of the public dockets created to receive comments for this proposed rule, as well as the Advanced Notice or Proposed Rulemaking published in 1997 (62 FR 31550; 6/10/97), including where and how public access to the dockets is available.

Sincerely

Ray S. McAllister
Senior Director, Science & Regulatory Policy
American Crop Protection Association
1156 - 15th St., NW, Suite 400
tel: 202-872-3874 fax: 202-463-8256
e-mail: ray@acpa.org

Thank you for your recent inquiry regarding the General Services Administration's proposed rule on Federal advisory committee management (65 FR 2504, 1/14/2000).

Although we are unable to extend the deadline for comments beyond March 14, 2000, as you requested, we will make an effort to consider your comments if they are received by the Committee Management Secretariat no later than the close of business on March 28, 2000. Due to the importance of this proposed rule to the Departments and agencies that sponsor advisory committees and the need to address those issues outlined in response to the Advance Notice of Proposed Rulemaking published in the Federal Register on June 10, 1997 (62 FR 31550), we must adhere to our publicly-announced schedule.

As outlined in our Notice of Proposed Rulemaking, all docket materials are available from the Committee Management Secretariat at:

1800 F Street NW, Room G-230
Washington, DC 20405

Requests for copies of any or all comments received may be addressed to Ms. Debbie Connors (202) 273-3560. In addition, you may view and/or download copies of all comments received via the Secretariat's Home Page, located at:

policyworks.gov/FACA_Townhall

Thank you for your interest in the proposed rule.

3/10/00

From: "Ray McAllister" <RAY@acpa.org> AT internet on 03/10/2000 02:33 PM

To: Charles F. Howton/MC/CO/GSA/GOV

cc:

Subject: Request for Comments Deadline Extension

March 10, 2000

Mr. Charles F. Howton (Charles.howton@gsa.gov, 202-273-3561)
Deputy Director, Committee Management Secretariat (MC)
General Services Administration
Office of Government Policy
1800 F Street, NW (Room G-320)
Washington, DC 20405

Dear Mr. Howton:

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Sincerely

Ray S. McAllister
Senior Director, Science & Regulatory Policy
American Crop Protection Association
1156 - 15th St., NW, Suite 400
tel: 202-872-3874 fax: 202-463-8256
e-mail: ray@acpa.org

United States Department of Agriculture
Office of the General Counsel
Washington, D.C. 20250-1400

MAR 14 2000

SENT VIA FAX

Charles Howton
Deputy Director
Committee Management Secretariat
Office of Governmentwide Policy
General Services Administration

Subject: Federal Advisory Committee Management, Proposed Rule

Dear Mr. Howton:

The United States Department of Agriculture, Office of the General Counsel, would like to provide the following comments regarding the proposed rule published in the January 14, 2000, edition of the Federal Register concerning management of Federal Advisory Committees.

We welcome clarification of the applicability of the procedural requirements of the Federal Advisory Committee Act ("FACA") to subcommittees. However, there is some contradiction within the rule and the explanatory text. Under the section discussing "what significant revisions are being made," the explanatory text states that "[b]ecause a subcommittee which reports to a parent committee is not an 'advisory committee' under FACA, there is no legal basis for applying any of FACA's requirements to such a subcommittee." This seems to be an overstatement given that under section 102-3.170, if the subcommittee meetings lead to decisions that will not be deliberated further by the full committee, then the meeting procedures apply to the subcommittee. In addition, in order to further clarify the differences between committees and subcommittees, we recommend that there be a definition for subcommittee meetings, as well as the one provided for committee meetings.

Section 102-3.15(b) explains when a committee terminates but leaves out the most common reason, the two year time limit. This, however, is explained in section 102-3.70. This section also explains that the two year life span does not apply if the statutory authority used to establish the advisory committee provides for a different duration. We recommend that the rule include a discussion of what agencies should consider to determine if a statutory authority provides for a different duration. Frequently statutes do not provide a specific ending date for an advisory committee, but from the nature of the committee, or other language in the statute, it seems that Congress intended a longer life span than two years. Under what circumstances can the agency continue a statutory committee as a non-discretionary committee despite the failure of the authorizing statute to provide an explicit duration, and when must the agency simply treat the renewal of a committee created as a nondiscretionary committee as a discretionary committee?

If you have any questions regarding this comments, please call Sean Kelly of this office on (202) 720-4916

Sincerely,

(b) (6)

Betty L. Ollila
Deputy Assistant General Counsel
General Law Division